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WASHINGTON REPORTS

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CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

FEBRUARY 21, 1916—APRIL 21, 1916

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CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 12991. Department One. February 21, 1916.]

JOHN MATTSON, *Appellant*, v. GRIFFIN TRANSFER COMPANY, *Respondent*.[1]

JUDGMENT—ENTRY—NOTWITHSTANDING VERDICT—TIME—ENTRY OF VERDICT. The entry of verdict in the minute book and journals of the court is not entry of the judgment, and does not bar entry of judgment *non obstante veredicto*, as would be the case if judgment had been entered.

SAME. Judgment *non obstante veredicto* may be granted after reception of the verdict, but can only be resorted to where there is no element of judicial discretion and the court can say there is no evidence or reasonable inference from evidence to sustain the verdict; otherwise, the remedy is by motion for a new trial.

TRIAL—ISSUES—SUBMISSION TO JURY—PROVINCE OF COURT. The practice of submitting a case to the jury, although the court is convinced that there is no fact to sustain the verdict, is not to be discouraged; and so doing does not waive the court's judicial function of determining whether any lawful judgment can be entered upon an undisputed state of the record.

MASTER AND SERVANT — INJURIES TO SERVANT — ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE. A teamster, suffering injuries in a runaway, assumes the risk of a broken seat spring, complained of to the foreman who promised to fix it after return from the trip, where there was no element of coercion, and it was a simple defect, well known to him, and he could have easily repaired it for the one trip by tying a rope or wire around the loose end of the spring; since the promise to repair did not relieve him of the duty to exercise reasonable care under the circumstances.

[1]Reported in 155 Pac. 392.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered March 30, 1915, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee engaged in delivering wood. Affirmed.

Govnor Teats, Leo Teats, and *Ralph Teats*, for appellant.

S. F. McAnally, for respondent.

CHADWICK, J.—Appellant is a teamster and had been in the employ of the respondent for about twelve years. Respondent operates several fuel yards in the city of Tacoma. Just before noon on the 6th day of August, 1913, appellant was directed to hitch onto a wagon and deliver a load of wood. Appellant had not, theretofore, driven the wagon he was directed to take. He says, and the jury found, although the greater number of the witnesses testified to the contrary, that one of the springs under the wagon seat was broken; that the upper half of the spring had come loose from the lower half; that the two halves, where they came together at the back of the spring, had been fastened together with a piece of wire, but that the front ends had not been fastened in any way, the upper half resting on top of the lower half; that he called the attention of the yard foreman to the defect, saying: "This wagon is not fit to go down that hill with this team" (the horses were young and had been but recently broken); to which the foreman replied: "This is the only wagon that we got here, and you got to take it now, and when you get back we have it fixed up." Upon cross-examination, appellant admitted that he probably would have taken the wagon without this assurance.

Appellant also testifies that the wagon had been driven by, and in that sense belonged to, one Iverson, that Iverson had refused to take it out because it was broken, that he ex-

pected to use it just for the one trip, and that Iverson would take it after it was fixed.

After the complaint and promise to repair, appellant went to his lunch, and, after lunch, started with his load. In driving down a hill, a trace chain came loose and struck one of the horses, which kicked over the tongue. This so frightened both of the horses that they ran away. Appellant fell from the wagon, which passed over his legs, so bruising him that he was incapacitated for seven or eight weeks and now suffers a permanent stiffness and weakness of the limbs. After he recovered, he returned to work for the respondent and continued in his employ until some time in May following, when he demanded that respondent pay one of his doctor's bills amounting to about $20. Respondent refused to do this unless appellant would sign a release, it having been reported that appellant intended to bring an action against him. Appellant refused to sign a release and was discharged, whereupon this action was brought to recover damages.

Appellant alleges the proximate cause of his injury to be the broken spring. He testifies that, when the horses started to run, the wagon struck against the curb of the street; that the seat fell, so that he had no way of bracing himself, and in consequence was thrown from the wagon. A verdict in favor of the appellant was rendered on the 13th day of January, 1915. The clerk made the following entry on his minute book:

"We, the jury in the case John Mattson plaintiff vs. Griffin Transfer Co. defendant, find for the plaintiff and against the defendant and assess his damages in the sum of three thousand one hundred and thirty-seven dollars ($3,137).

"Dated at Tacoma, Washington, this 13th day of January, 1915. Chas. Zeigler, Foreman."

On the next day, respondent filed a motion for judgment *non obstante veredicto*, which was sustained by the court. Appellant contends, (a) that the motion for judgment *non obstante* came too late, and (b) that the court had no power

or jurisdiction to enter judgment *non obstante* after the return and recordation of the verdict. To sustain the first contention, appellant maintains that the entry of the verdict was an entry of a judgment under the statute, Rem. & Bal. Code, § 431 (P. C. 81 § 729), and that no motion other than a motion for a new trial could have been entertained by the court. He relies upon *Jensen v. Shaw Show Case Co.*, 76 Wash. 419, 136 Pac. 698; *Brown v. Walla Walla*, 76 Wash. 670, 136 Pac. 1166; *Forsyth v. Dow*, 81 Wash. 137, 142 Pac. 490, and *Paich v. Northern Pac. R. Co.*, 82 Wash. 581, 144 Pac. 919.

The power of the court to entertain a motion for judgment *non obstante veredicto*, if made before the entry of judgment, is now well settled. It is as well settled, and by the same authorities, that such motion cannot be invoked after the judgment has been entered. The entry of the verdict in the minute book and the journals of the court is not, of itself, an entry of judgment. The reception of a verdict and its entry is a thing entirely distinct from the rendition or entry of a judgment. The duty of the clerk of the court is defined by statute. He is required to keep a record of the proceedings of the court, and to receive the verdicts of the juries. Rem. & Bal. Code, § 77 (P. C. 127 § 53). In the same section the clerk is directed to keep a journal and to enter, under the direction of the court, all orders, judgments and decrees.

Although we have held that the entry of a judgment by the clerk under § 431 need not be a formal judgment, we have never held that the reception of a verdict is, in itself, an entry of judgment. That it is not, is implied, if not pronounced, in all of our decisions going to the question. In *Forsyth v. Dow*, *supra*, to which counsel directs our attention, the entry recited:

"The verdict is received and filed and judgment is hereby entered in accordance with the verdict in favor of the plaintiff and against the defendants in the sum of, etc."

In *Paich v. Northern Pac. R. Co., supra*, the verdict was received and filed and "judgment entered in favor of the plaintiff and against the defendant in accordance with the verdict." In each of these cases there was enough in the entry to show that the clerk had in mind the duty imposed by statute to enter a judgment and that he had done so.

In the instant case, the entry was no more than a formal recital of the reception of the verdict, as required by Rem. & Bal. Code, § 77 (P. C. 127 § 53). If we were to indulge in presumptions, keeping in mind the duty of the clerk as well as the discretion and power of the judge to control procedure and the records of the court, it would seem most likely that the entry of the judgment in this case was reserved under the direction of the court, for we have held, if the judge desires to reserve judgment, he may direct that it be "not presently entered." *Forsyth v. Dow, supra.* See, also, *Beck v. International Harvester Co.*, 85 Wash. 413, 148 Pac. 35. The entry relied on, as any entry of a judgment, did not bar the court from considering and passing upon the judgment *non obstante veredicto.*

The contention that the court's jurisdiction, after the reception of a verdict, is limited to the granting of a motion for a new trial is based upon the decision of the supreme court of the United States in the case of *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, Ann. Cas. 1914 D. 1029. That court does not hold, indeed it expressly disavows any purpose to impress, the rule of that decision upon the state courts. We have no disposition to criticise the opinion of the majority of the court. We recognize it as a sincere and able presentation of the question then vexing and perplexing the judgment of the court. But it seems to us that the argument of Mr. Justice Hughes, with whom joined Justices Holmes, Lurton, and Pitney, is an unanswerable presentation of the true principles involved in the case. The argument of the majority (p. 369) is that the judge may direct a verdict at the close of the testimony, but if he take the verdict of a jury, he can-

not entertain a motion *non obstante veredicto*, although convinced that the verdict cannot stand for the want of sustaining fact, and that in no event can a judgment be entered upon the verdict. He must grant a new trial and, this being done, upon a retrial, he may grant a nonsuit or direct a verdict at any time before the case is submitted to the jury. This reasoning seems to us to be highly technical, circuitous, and "cumbrous" (p. 428). It compels unnecessary formality and possibly intolerable expense before the judge can say that there is no fact to sustain the verdict, or upon admitted facts, that the law will not tolerate a judgment. Justice Hughes so clearly points out that a motion *non obstante veredicto* and its consideration by the court is not an invasion of the province of the jury, that we will not pursue the inquiry, except to say that, under the practice prevailing in this state and elsewhere generally, the court may say, at any stage of the proceedings, that there is no evidence or reasonable inference from evidence to sustain a judgment.

"The motion for judgment notwithstanding the verdict invokes no element of discretion. It invokes the pure judicial functions of the trial court and of this court on review. It can only be granted when the court can say, as a matter of law, that there is neither evidence nor reasonable inference from evidence sufficient to sustain the verdict." *Brown v. Walla Walla*, 76 Wash. 670, 136 Pac. 1166.

We have persistently endeavored to impress the fact that a judgment *non obstante veredicto* cannot be resorted to where there is any element of judicial discretion, for if there be an element of discretion or any dispute of fact, the remedy is by motion for a new trial. This we suggested in *Forsyth v. Dow*. We quoted from *Auwarter v. Kroll*, 79 Wash. 179, 140 Pac. 326, where the court had rendered a judgment *non obstante veredicto*, and it appeared that there was a substantial conflict in the testimony. We said:

"We can divine no reason—certainly none is apparent in the record—for the order of the court, except that the judge

was of the opinion that the verdict was contrary to the weight of the evidence. If so, his power was limited to making an order granting a new trial."

A like ruling was made in *Fobes Supply Co. v. Kendrick*, 88 Wash. 284, 152 Pac. 1028; *Walling v. Elbert*, 87 Wash. 489, 151 Pac. 1081; and in *Mathis v. Granger Brick & Tile Co.*, 85 Wash. 634, 149 Pac. 3.

The practice of submitting a case that has been tried out to the end, to the jury, although the court may be convinced that there is no fact to sustain a verdict, or that, upon the undisputed facts, a verdict will not stand, is not to be discouraged; nor is there any reasonable ground for holding that a court, having done so, has waived its judicial function—the power to say whether any lawful judgment can be entered upon an undisputed state of the record.

The province of the jury is to decide disputed questions of fact. The function of the court is to pronounce the law where the fact is undisputed, or where there is neither evidence nor reasonable inference from evidence to sustain the verdict. In holding to the rule of the minority in the case relied on, we adopt the words of Justice Hughes:

"We have here a simplification of procedure adopted in the public interest to the end that unnecessary litigation may be avoided. The party obtains the judgment which in law he should have according to the record." *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 428.

Upon the merits of the case, we are constrained to follow the judgment of the court below. Many cases are cited, but they do not approximate the facts in this case. Appellant was an experienced teamster. He knew the danger complained of as well as the foreman, who, he says, promised to fix the spring after he returned from his trip. The defect was open, patent, and obvious. It is not the act of a reliance upon a promise to repair a defective appliance alone that creates a liability. The promise must be for the benefit and assurance of the one using the appliance. The promise

must have in it an element of coercion, arising in fact or implied in law, or partake of a character such as may be called in law "superior judgment." Upon a questioned state of facts, or upon a difference of opinion, "superior judgment" is always attributed to the master, as for instance, a promise to prop a mine or tunnel, or where the servant is using an instrument or machine which is a part of a mill, the movement of which is under the control of the master. However arising, the questions to be met in all cases where the defense of assumption of risk is tendered are: Was the defect complained of, open, obvious, and patent? Was the promise the inducement to continue at work, and did the servant act as a man of ordinary prudence under the circumstances?

These are the primary rules governing the defense of the assumption of risk. The instrument in this case was in the hands of appellant. There was no difference of opinion or in judgment. The probability of the seat falling, as distinguished from a possibility, was as well or better understood by appellant than by the foreman. After appellant had called the attention of the foreman to the defect, he went to his lunch, after which he started with his load. The promise, if made and performed, would have benefited him in no way, or if performed, it would not have tended to his protection in any degree. He admits his habit and ability to make slight repairs in the course of his employment. It would seem that, if the danger was really imminent, a prudent man would have insisted upon an immediate repair, or would have twisted a wire around the front end of the spring and made it temporarily secure, as the back end had been made secure by a like method.

That a workman using and having control of a simple instrument "presenting no complicated question of power, motion or construction" (*Cole v. Spokane Gas & Fuel Co.*, 66 Wash. 393, 119 Pac. 831), and having knowledge of a defect requiring attention, is put to some care to protect him-

self, is held in *Greinert v. Lamont Inv. Co.*, 76 Wash. 82, 135 Pac. 817. There the workman was charged with the duty of forming a proper loop so that it would hold blasted material which he was hoisting from a well. We said:

"Every one knows that such a loop could have been safely formed by any one of a number of simple knots, and when respondent found that the loop in use refused to hold, the exercise of ordinary care on his part required that he form the loop in a more secure way."

So, in this case, it would seem that respondent, intending to use the wagon for one trip only, should have exercised ordinary care to the extent of tying a rope or wire around the loose end of the spring; for it is held in all the books that a promise to repair does not relieve the servant of the duty to exercise due and reasonable care under the circumstances. *Trudeau v. American Mill Co.*, 41 Wash. 465, 83 Pac. 725.

The obvious fact that a broken seat spring is a simple instrument is indicated in *Bougas v. Eschbach-Bruce Co.*, 77 Wash. 347, 137 Pac. 472, where, after noting many things, we likened a clamp and key to ordinary tools and implements used upon the farm, "such as lines, tugs, neck yokes, double trees, lead bars, lead chains, clevises, brake rods, etc."

We have not overlooked the attempt of appellant to inject the element of coercion into the promise to repair. When asked what would have happened if he did not do as he was told to do, he said, in substance, if he had not done so he would have been "fired"; that all the workingman can do is to obey orders or quit work. It might be that, in some cases, this would be sufficient, but it surely is not enough to bring appellant within the rule where there is neither testimony nor circumstance to sustain his conclusion.

We find no legal ground to rest the verdict upon. The judgment *non obstante veredicto* is affirmed.

MORRIS, C. J., MOUNT, ELLIS, and FULLERTON, JJ., concur.

[No. 13009. Department One. February 24, 1916.]

In the Matter of the Estate of Lucinda Clogston Lind.[1]

Appeal—Review—Change of Theory—Points Not Made Below. In a proceeding to share in an estate as a daughter of the deceased, in which the claimant elected to stand upon the claim that she was a natural daughter, tried throughout on that issue, and disclaiming an adoption, it cannot be claimed on appeal that she was shown to be an adopted daughter.

Adoption—Agreement to Adopt—Evidence—Admissibility. In a proceeding to share in an estate as a daughter of the deceased, evidence as to a lost paper claimed to show an agreement for an adoption is inadmissible, where there was nothing to indicate whether it was an agreement to adopt or simply a relinquishment of parental control by the father.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered February 25, 1915, dismissing a petition in probate to establish a right to share in an estate as daughter of the deceased, after a hearing on the merits and an advisory verdict by a jury. Affirmed.

Claude E. Stevens and *Roney & Loveless*, for appellant.

Myers & Johnstone, for respondent.

Ellis, J.—The decedent, Lucinda Clogston Lind, by will, left to her surviving husband, the respondent, Edward Lind, a life estate in all of her property. As to the residue, save certain minor matters with which we are not concerned, she died intestate.

The appellant, Jennie Clogston Ballard, by petition in the probate proceedings, sought to establish her right to this residue as an only child of the deceased. The respondent, as executor and claiming to be the sole heir, contested the petition, asserting that the appellant is a foster child of deceased and her former husband, one John D. Clogston, who is also dead.

[1]Reported in 155 Pac. 159.

Upon appellant's request, the question of fact was submitted to a jury for an advisory verdict. The jury found for appellant. Upon motion of respondent, the court disregarded the verdict and, from the evidence, found that appellant is not the child of deceased, and thereupon entered a decree awarding the residue of the estate to respondent, as the surviving husband and sole heir at law of deceased; hence this appeal.

It is not claimed that the trial court was bound by the advisory verdict. It is asserted, however, that the evidence preponderated in favor of the jury's finding, and that the court therefore erred in refusing to adopt it. The question presented is purely one of fact. It would be worse than useless to discuss the evidence, some of which tends to reflect upon the characters of persons now dead. We have considered every phase of it with the utmost care. We are thoroughly satisfied that it strongly preponderates in favor of the court's finding.

But one other matter calls for specific notice. Several witnesses testified that deceased had often referred to the appellant as her adopted daughter. Certain other witnesses testified to the existence of a paper referring to the appellant as Jennie Annie MacIntosh and signed by one MacIntosh as her father, and by John D. Clogston. This paper is loosely referred to as an adoption paper. One Svedmark, a divorced husband of appellant, claims to have copied it, but neither the original nor any copy was produced. No one testified to the contents of the paper with any degree of certainty. It seems to be admitted that the Clogstons never actually adoped appellant. At any rate, no record of any adoption was offered.

Appellant urges that the admitted existence of this so-called adoption paper furnished evidence sufficient to warrant the enforcement of some supposed agreement to adopt as an agreement made for her benefit. There are two fatal flaws in this position. In the first place, appellant elected

to stand upon her claim that the deceased was her natural mother, expressly disclaiming any interest in the estate through adoption. The case was tried throughout upon that theory. To permit this change of attitude now, in the face of that election, would be manifestly unfair. In the second place, there is nothing to show whether the paper in question was in fact an agreement to adopt or merely a relinquishment of parental control of the child by the father, MacIntosh, to the Clogstons. What evidence there is sustains the latter hypothesis. We find nothing in the record warranting a reversal.

The decree is affirmed.

MORRIS, C. J., MOUNT, FULLERTON, and CHADWICK, JJ., concur.

[No. 12909. Department One. February 26, 1916.]

KITSAP COUNTY BANK, *Respondent*, v. UNITED STATES FIDELITY & GUARANTY COMPANY, *Appellant*.[1]

APPEAL—REVIEW—QUESTIONS PRESENTED—EXCEPTIONS TO FINDINGS—NECESSITY. Under Rem. & Bal. Code, § 383, requiring exceptions to findings of fact to be filed within five days, the supreme court cannot, when filed too late, review the evidence except so far as to pass upon the exclusion of offered evidence, and the refusal of the trial court, duly excepted to, to make proposed findings not contradictory to those made.

SAME—PRESERVATION OF GROUNDS—EXCEPTIONS TO FINDINGS—TIME—EXTENSION. The time for filing exceptions to findings of fact cannot, by the filing and hearing of a motion for a new trial, be enlarged beyond the five days limited in Rem. & Bal. Code, § 383.

SAME—REVIEW—QUESTIONS PRESENTED. Exceptions to the admission of evidence cannot cure the failure to except to findings based thereon, which failure waives exceptions to the admission of evidence.

TRIAL — ISSUES AND FINDINGS — PROPOSED FINDINGS — PROPRIETY. Where a chattel mortgage foreclosure was transferred to the superior court by an injunction suit, a finding in an action on the injunction

[1]Reported in 155 Pac. 411.

bond that $350 was expended in the injunction suit is not contradicted, but merely amplified, by a proposed finding that said sum was not expended in contesting the injunction but was incurred in the foreclosure action, which was but another name for the injunction suit.

SAME. In such a case, a proposed finding that the mortgagee acquired possession of the mortgaged property by an independent action in replevin impliedly under an independent title, supported by the evidence, is material and should have been made, when not contradictory to the other findings made and unexcepted to.

INJUNCTION—ACTION ON BOND—DAMAGES—COSTS OF SUIT—UNCONTESTED INJUNCTION. In an action upon an injunction bond given to transfer a chattel mortgage foreclosure to the superior court, an item of $350 expended by plaintiff for attorney's fees in the foreclosure suit cannot be recovered, no motion having been made to dissolve the injunction, which was not contested.

SAME—DAMAGES—KEEP OF PROPERTY—INDEPENDENT TITLE—UNCONTESTED INJUNCTION. In an action upon an injunction bond given to transfer a chattel mortgage foreclosure to the superior court, expenditures by the plaintiff for clerk's, sheriff's, and keeper's fees, horse feed and other costs of maintaining the property cannot be recovered where the injunction was not dissolved or contested, and the plaintiff recovered possession of the property in an independent action of replevin, impliedly under an independent title; since the expenditures were made by plaintiff in the care of its own property and were not necessitated by the injunction.

SAME—DAMAGES—DETERIORATION—LOSS OF SALE. In an action upon an injunction bond given to transfer a chattel mortgage foreclosure to the superior court, the plaintiff can recover the damages by reason of the depreciation in the value of the property that would have been avoided by the advertised foreclosure sale, which was lost to plaintiff by reason of the injunction.

Appeal from a judgment of the superior court for King county, Humphries, J., entered January 23, 1915, upon findings in favor of the plaintiff, in an action upon an injunction bond, tried to the court. Reversed.

Vince H. Faben, for appellant.

Ryan & Desmond, for respondent.

ELLIS, J.—This is an action upon a bond given upon an injunction ancillary to the transfer of summary proceedings to foreclose a chattel mortgage from the sheriff to the su-

perior court for proceedings by suit pursuant to Rem. & Bal. Code, § 1110 (P. C. 349 § 23). The case was tried to the court without a jury.

The court found, in substance, that, on October 1, 1910, the plaintiff, then being the owner of a chattel mortgage executed by the Kitsap Mill Company on personal property consisting of machinery and equipment of a lumber mill in Kitsap county, began foreclosure, through the sheriff, by taking possession of the property and giving notice of sale, under which the property would have been sold on October 18, 1910; that on October 4, 1910, the mill company, in an action against the sheriff, the plaintiff and one Lundberg, in the superior court of King county, obtained an order restraining the sale and a show cause order returnable on October 7, 1910; that on October 7, 1910, on the hearing of the return to the show cause order, the court entered an injunction restraining the foreclosure, except by an action in court, and restraining any interference with the operation of the mill, and requiring that, upon the giving by the mill company of a bond in the sum of $1,000, the property be turned back to it; that on October 7th, pursuant to that order, the defendant herein, United States Fidelity & Guaranty Company, executed such bond for $1,000, conditioned that the mill company would pay all damages and costs resulting from the injunction; that thereafter the plaintiff, Kitsap County Bank, in an action of replevin in the superior court of Kitsap county against the mill company, claimed the right to possession of the mortgaged property and other property, and by giving a replevin bond secured a writ of replevin on which the sheriff made his return in October, 1910, and delivered the property to the plaintiff. The court's findings then conclude as follows:

"That at the time of the issuance of said injunction and the filing of the bond herein sued upon, the said Kitsap Mill Company was indebted to the plaintiff herein by reason of said mortgage in the sum of $1,400, together with interest

thereon at the rate of 10 per cent per annum, from August 19, 1910, and that, at said time, one John H. Lundberg, an experienced and practical mill man, who held a prior mortgage on said property, had agreed to purchase, and would have purchased the Kitsap County Bank's equity therein, for the full amount of its mortgage, and that, by reason of said injunction and the postponement and discontinuance of said sale as noticed, the sale of plaintiff's equity in said property to said John H. Lundberg, failed, and that the said plaintiff herein has been unable to make a sale of said property, or any portion thereof, for any amount whatsoever, and that the said mill machinery and equipment described in said mortgage is unsalable and still in its possession, and the same has become rusted and corroded and greatly depreciated in value, without fault of plaintiff, to plaintiff's damage in the sum of $500; and that, in addition thereto, said plaintiff was forced to, and did incur attorney's fees, which it has paid, in the sum of $350, for its defense in said injunction suit, and that, pending the entry of the judgment therein, this plaintiff was forced to, and did expend the sum of $438.56 in clerk's and sheriff's fees, keeper's fees, horse feed and other costs necessary for the safekeeping and maintenance of the property."

No exceptions were taken to any of these findings save to that quoted, and the exception to that was filed two days late.

The defendant, however, made a timely request for findings, in substance, as follows: That the action of replevin was commenced by the plaintiff on October 11, 1910; that on that date the property was seized by the sheriff and kept in his possession until October 20, 1910, when it was delivered to the plaintiff's possession; that from October 11th to October 20th, the property suffered no deterioriation from rust, corrosion or otherwise; that plaintiff made no motion to dissolve the injunction, and that any costs and fees incurred by the plaintiff were incurred in the foreclosure suit on its merits; that all expenses incurred by the plaintiff for the preservation of the property were incurred subsequent to October 11th, 1910, and that the sum of $18.80 was paid

in the foreclosure suit for clerk's fees; that the foreclosure proceedings went to final decree on December 6, 1910, and it was therein adjudged that Lundberg had a valid first mortgage on the property for $1,000 and interest, and that plaintiff had a valid mortgage for $1,400 and interest, subject to that of Lundberg; that the decree provided for a sale of the property, the proceeds to be used, first, in satisfaction of the Lundberg mortgage, with interest and costs, and the balance, if any, in satisfaction of the plaintiff's mortgage, with interest and costs, but that no sale was ever ordered or made under that decree; that the plaintiff's replevin suit proceeded to judgment on December 6, 1910, wherein the plaintiff was adjudged to be the lawful owner of the property. Seasonable exceptions were taken to the refusal of the court to make these findings.

On the findings made by the court and an appropriate conclusion of law, judgment was entered in favor of the plaintiff and against the defendant for $1,000 and costs. Defendant appeals.

The respondent moves to dismiss this appeal, indicating many particulars in which the appellant has failed to observe the governing statutes. An inspection of the record shows that the appellant has in fact been tardy in almost every step taken during the progress of the appeal. But it does not follow that the appeal must be dismissed. None of the defective steps call for a dismissal of the appeal, though the failure of the appellant seasonably to take exceptions to the court's findings does preclude a review of the evidence, except so far as necessary to pass upon the action of the trial court in *excluding* offered evidence (*Bringgold v. Bringgold*, 40 Wash. 121, 82 Pac. 179; *Berens v. Cox*, 70 Wash. 627, 127 Pac. 189; *Harbican v. Chamberlin*, 82 Wash. 556, 144 Pac. 717), or to pass upon the refusal of the trial court to make proposed findings not contradictory to those made, to which refusal timely exceptions have been taken (Rem. &

Bal. Code, § 1736 [P. C. 81 § 1225]; *Home Savings & Loan Ass'n v. Burton*, 20 Wash. 688, 56 Pac. 940).

It is admitted that the exceptions to the court's findings were filed two days late. We have consistently held that exceptions to be in time must be filed "within five days" after notice of decision. The statute so requires. Rem. & Bal. Code, § 383 (P. C. 81 § 673); *Frair v. Caswell*, 79 Wash. 470, 140 Pac. 564; *Cornthwaite v. Barrington Trans. Co.*, 55 Wash. 389, 104 Pac. 609; *Fulton v. Methow Trading Co.*, 45 Wash. 136, 88 Pac. 117; *Fisher v. Kirschberg*, 17 Wash. 290, 49 Pac. 488; *National Bank of Commerce of Seattle v. Seattle Pickle & Vinegar Works*, 15 Wash. 126, 45 Pac. 731; *Ballard v. First Nat. Bank*, 13 Wash. 670, 43 Pac. 938; *Irwin v. Olympia Water Works*, 12 Wash. 112, 40 Pac. 637; *Rice v. Stevens*, 9 Wash. 298, 37 Pac. 440.

The appellant insists that, where the exceptions are filed before the motion for a new trial is argued, though more than five days after notice of the filing of the findings as required by the statute, the exceptions should be held seasonable. It is sufficient answer to say that, in the record here, it does not appear when the motion for a new trial was actually argued. It was filed November 28, 1914. The order overruling it was entered on January 13, 1915. There is nothing to show when it was argued. But assuming that it was argued on the day the order overruling it was entered, we have no warrant to enlarge the period for filing exceptions as fixed by the statute. To do so would be "judicial legislation," a thing which courts are often admonished to avoid. If the legislature had intended any such latitude it would have been easy to say so. The statute is definite, clear and explicit. The words "within five days" are not open to construction. Until the legislature has said that these words mean something else, we must assume, as we have always assumed, that they mean what they say. The exceptions to the findings as made by the trial court were late and are of no more efficacy than if they had never been taken.

Two of the assignments of error are based upon alleged improper *admissions* of evidence to which exceptions were taken. These we cannot consider. All evidence *admitted*, whether properly or improperly, is merged in the court's findings. Exceptions to the admission of evidence cannot cure the failure to except to the findings based thereon. Obviously the failure to except to the findings waives the exception to the admission of evidence. *Washington Brick, Lime & Mfg. Co. v. Adler*, 12 Wash. 24, 40 Pac. 383; *Berens v. Cox, supra.*

In the absence of exceptions to the findings, we are authorized to review the evidence in so far as necessary to pass upon objections to the *exclusion* of offered evidence, since such evidence is not merged in the findings (*Berens v. Cox, supra*); but in the case here, no error is assigned upon any such exclusion.

From the foregoing, it follows that there are only two questions presented by the assignments of error which are open to our consideration: (1) Do the findings support the judgment? (2) Did the court err in refusing to make other findings proposed, to which refusal seasonable exceptions were taken?

An examination of the findings proposed and refused convinces us that but two of them are material. The proposed finding that the costs and attorney's fees incurred by the respondent were incurred in the foreclosure action and not in contesting the injunction, and that no motion to dissolve the injunction was ever made, is supported by the evidence and is material. It does not contradict, but merely amplifies and explains, the findings made by the court that the respondent had expended $350 in the injunction suit, which is but another name for the foreclosure action if the injunction itself was not contested. The court made no finding that it was, though proof of that fact was clearly necessary to sustain a recovery of costs of such a contest. Since this proposed finding does not contradict but merely makes clear

the finding made by the court, the failure to except to the court's finding does not preclude a holding that, under the evidence, this additional finding should also have been made. Had the foreclosure proceeding been transferred to the court without any injunction, as it might have been under the statute, the same costs would have been incurred. It is clear, therefore, that this item of $350 cannot be considered in computing the damages recoverable on the injunction bond.

The proposed finding that the respondent acquired possession of the property by an independent action in replevin, and impliedly under an independent title, is also supported by the evidence and is material. It does not contradict the finding on the same subject as made by the court, but is only more complete and specific. Here, again, the failure to except to the finding made does not preclude a holding that, on the evidence, this additional finding should also have been made. The finding made by the court, thus amplified, makes it clear that the item of $438.56, found by the court to have been expended by the respondent in the care of the property, was an expenditure in the care of its own property and was not traceable to nor necessitated by the injunction. It follows that this item also should be eliminated from consideration in computing the damages recoverable on the injunction bond.

The item of $500 depreciation in the value of the property, which the court found would have been avoided by the sale of the mortgaged property on October 13th by the sheriff on the foreclosure by notice, which was enjoined, is the only remaining item of damage found. The court found, and we must accept the finding as true, that the respondent at that time had arranged the sale of the property to Lundberg for the full amount of its debt, and that this sale was lost by reason of the injunction. Obviously, the loss so resulting was the deterioration in the value of the property which the respondent was compelled to retain. The judgment, therefore, should have been for only $500 and costs.

In fact the court's findings, regardless of those proposed and refused, would sustain no greater judgment.

The claim that there was a defect of parties plaintiff is without merit. While there were three obligees named in the bond, their interests were separate. The right of action on the bond was therefore several. *Harrington v. Gordon*, 42 Wash. 692, 80 Pac. 187.

The judgment is reversed, and the cause is remanded with direction to enter judgment in accordance herewith.

MORRIS, C. J., MOUNT, CHADWICK, and FULLERTON, JJ., concur.

[No. 12698. Department One. February 29, 1916.]

THE STATE OF WASHINGTON, *Appellant*, v. MARIE BRYANT, *Respondent*.[1]

BAIL—FORFEITURE—INSUFFICIENT INFORMATION. A bail bond given on a criminal charge cannot be forfeited for nonappearance of the accused where the information was insufficient.

PROSTITUTION—INFORMATION—CERTAINTY. In view of Rem. & Bal. Code, § 2057, requiring the information to be direct and certain as to the crime charged and the particular circumstances thereof, an information charging the accused with being "willfully and unlawfully a common prostitute," does not sufficiently state the facts constituting an offense under an ordinance making it unlawful to be a common prostitute or to habitually practice prostitution and have indiscriminate sexual intercourse with men for hire and to be commonly known to be a common prostitute; the ordinance being intended to reach only the practice of prostitution for hire, while one may be a common prostitute without practicing for hire.

CRIMINAL LAW—APPEAL FROM JUSTICE—TRIAL—NEW INFORMATION. Upon appeal from justice court in a criminal case, the cause is transferred to the superior court for trial *de novo*, and the court should, if the information is insufficient, allow a new information to be filed, and after arraignment and plea, proceed to trial thereon.

Appeal from an order of the superior court for Chelan county, Pendergast, J., entered September 16, 1914, upon

[1]Reported in 155 Pac. 420.

sustaining a demurrer to the information, dismissing a prosecution for violation of an ordinance. Reversed.

John E. Porter and *Kemp & Baker*, for appellant.

Reeves, Crollard & Crollard, for respondent.

MOUNT, J.—The state has appealed from an order of the trial court discharging the respondent after a demurrer was sustained to an information. The facts are as follows:

On August 15, 1914, a complaint before the police justice of the city of Wenatchee was sworn to charging that the respondent was, on that date, "in the city of Wenatchee, Chelan county, state of Washington, wilfully and unlawfully a common prostitute, and did have indiscriminate sexual intercourse with men for hire, contrary to ordinance No. 377, passed by the council of the said city and approved and published according to law." Upon this complaint, a warrant was issued and the defendant was arrested.

On the 17th day of August, 1914, after the defendant had entered a plea of not guilty, the city attorney, by leave of the police justice, filed another complaint charging the respondent as follows:

"That Marie Bryant was, on or about the 16th day of August, 1914, in the city of Wenatchee, Chelan county, state of Washington, wilfully and unlawfully a common prostitute, contrary to ordinances Nos. 377 and 381, passed by the council of the said city, and approved and published according to law."

The defendant was arraigned and pleaded not guilty to this last charge. A trial was then had before the police justice and a jury, the defendant was convicted, and the verdict fixed her fine at $35. The next day the defendant gave notice of appeal to the superior court, and the justice fixed her bond in the sum of $100.

Section 11 of the ordinance under which the prosecution was had provides as follows:

"It shall be unlawful for any female person to be a common prostitute or to habitually practice prostitution and have indiscriminate sexual intercourse with men for hire, and to be commonly known and reputed to be a common prostitute."

The next section provides a penalty of either fine or imprisonment or both.

The case on appeal to the superior court was set down for trial on the 16th day of September, 1914. When the case was called, the defendant not being present, counsel for the state moved the court to forfeit the bail. Counsel for the defendant objected to a forfeiture of the bail. The court at that time made no order thereon. Counsel then moved that the action be dismissed for the reasons that the court had no jurisdiction, that the information did not conform to the requirements of the law, and that the allegations of the information were insufficient to constitute a crime or a misdemeanor under the ordinances. The court sustained this motion, or demurrer, and stated that the prosecution was not authorized to file an amended or a new information, and dismissed the action. The state has appealed from that order.

It is argued, first, that the court erred in refusing to forfeit the bail because the defendant was not present, and because she was a fugitive from justice. If the court was right in holding that the information was insufficient under the ordinances and under the laws of the state, it is plain that it was right in refusing to forfeit the bail; for, where a bail bond is given upon a criminal charge and the information is insufficient, or if the defendant is acquitted, bail cannot be forfeited, and if forfeited, such forfeiture will be set aside, and the defendant will be entitled to a return of the bail. *State ex rel. Gabe v. Main*, 66 Wash. 381, 119 Pac. 844.

The principal question in the case is whether the information was sufficient, and if not, was the state authorized to file a new information. As stated above, the information charges

that the defendant was "wilfully and unlawfully a common prostitute." No facts were charged. The statute requires, Rem. & Bal. Code, § 2057 (P. C. 135 § 1019), that,

"The indictment or information must be direct and certain, as it regards: (1) The party charged; (2) the crime charged; and (3) the particular circumstances of the crime charged, when they are necessary to constitute a complete crime."

This court in *State v. Ackles*, 8 Wash. 462, 36 Pac. 597, said, at page 464:

"The accused, in criminal prosecutions, has a constitutional right to be apprised of the nature and cause of the accusation against him. Const., art. 1, § 22. And this can only be made known by setting forth in the indictment or information every fact constituting an element of the offense charged. This doctrine is elementary and of universal application, and is founded on the plainest principles of justice."

And in *State v. See*, 4 Wash. 344, 30 Pac. 327, 746, it was held that an indictment for perjury is defective which does not describe the proceedings at which the alleged perjury was committed.

It is argued by the appellant that, where a crime can be committed in but one way, it is sufficient to simply charge the crime without stating the facts. It will be noticed that the ordinance under which the information was filed recites that "it shall be unlawful for any female person to be a common prostitute, or to habitually practice prostitution and have indiscriminate sexual intercourse with men for hire, and to be commonly known and reputed to be a common prostitute." If the words following "common prostitute," viz., "or to habitually practice prostitution and have indiscriminate sexual intercourse with men for hire, and to be commonly known and reputed to be a common prostitute," are intended as a definition of what was meant by "common prostitute," as we think they were, then it is plain that the information should

have stated the facts which constituted the crime. A common prostitute may be one who practices prostitution without hire. Or she may be one who practices prostitution for hire. In *State v. Thuna*, 59 Wash. 689, 109 Pac. 331, 111 Pac. 768, 140 Am. St. 902, this court approved an instruction where the court told the jury that "Whether a woman is a common prostitute is a question of fact which does not depend alone upon the number of persons with whom she has had illicit intercourse, nor does it depend alone upon the question of whether she submits herself for gain." But the ordinance in this case, fairly construed, was, we think, intended to reach only those who practice prostitution for hire. It was necessary, therefore, to allege the facts constituting the offense as defined by the ordinance. We are satisfied that the trial court properly sustained the demurrer to the information.

We think the court erred in refusing to allow the prosecution to file a new information. The court was no doubt misled by what was said by this court in *State v. Hamshaw*, 61 Wash. 390, 112 Pac. 379. In that case, after referring to *State v. Bringgold*, 40 Wash. 12, 82 Pac. 132, we said: In so far as that case holds "that the superior court has jurisdiction to 'allow the complaint to be amended by the filing of a new complaint,' it may be considered as overruled." The trial court evidently concluded from this language that we meant to hold that a new complaint in a criminal action may not be filed. But in that case we further said:

"The appeal in such cases is taken, and the case proceeds, *de novo* upon the transcript from the justice court. The statute does not allow, as in civil cases, any amendment to the pleadings. It can be no embarrassment to the superior court or in any way interrupt its procedure, if it is of opinion that the complaint does not charge a crime, or that the defendant should be held for trial, to enter an order of dismissal *or order an information filed and, after arraignment and plea, proceed to the trial in an orderly way*, thus acquir-

ing jurisdiction in the manner sanctioned by the constitution and the statutes."

It is plain from this language, which we now italicize, that we did not intend to hold that a new information in a criminal case may not be filed in the superior court, and the case proceed to trial *de novo* upon that information.

In the case of *State ex rel. Adams v. Grimes*, 80 Wash. 14, 141 Pac. 184, where a change of venue was taken from one justice to another, and a new complaint filed, in discussing the right to file a new information we said:

"But clearly in doing so he acted within his powers. After the cause had been transferred to his court, he had the same power and authority over the subsequent proceedings as he would have possessed had the proceeding been originally commenced before him. He could allow a new complaint to be filed correcting the old one in any particular, even to allowing a change therein as to the offense charged against the defendant. He must, of course, give the defendant an opportunity to plead to the new complaint, and must allow him a reasonable time, if he demands it, to prepare his defense thereto, before putting him upon his trial, but the record shows that the justice complied with these requirements in the present instance."

And so in this case, the appeal from the police justice simply transferred the proceedings to the superior court where a trial *de novo* might be had. It was within the power of the court to allow the prosecution to file a new information if the one already on file was insufficient. The appeal simply transferred the proceedings from police or justice court to the superior court.

We are satisfied that the trial court was in error in refusing to allow the prosecution to file a new information, to receive a new plea, and proceed regularly thereupon. For this reason, the judgment is reversed, and the cause remanded with leave to file a new information.

MORRIS, C. J., FULLERTON, CHADWICK, and ELLIS, JJ., concur.

[No. 12760. Department One. February 29, 1916.]

LINDEMAN LUMBER COMPANY, *Respondent*, v. REMOLITE PAINT COMPANY, *Appellant*.[1]

PRINCIPAL AND AGENT—CONTRACTS OF AGENT—EMPLOYMENT OF FACTOR—RATIFICATION—EVIDENCE—SUFFICIENCY. There was not only a contract by the sales agent of the defendant, a paint company, making plaintiff its agent for the sale of paint on commission, but a ratification of the sales agent's agreement by acceptance of the proceeds thereunder, where the preponderance of the evidence was to the effect that the sales agent took up the matter in response to direct communications between the plaintiff and defendant, entered into the contract, assisted plaintiff in making certain sales agreed to be applied under the contract, and figured plaintiff's commissions on such sales, orders for which were filled directly by the defendant at the consumer's price, while plaintiff's order was filled at such price less the agreed upon commissions, and it appeared that defendant collected the full price for such sales, and in a letter in regard to the same stated to plaintiff that any credits "due for commissions are not payable to you until we have been paid by the people to whom we made direct shipment."

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered November 14, 1914, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Roberts & Udell, for appellant.

Lynch & Chesterley (*Davis & Morthland*, of counsel), for respondent.

FULLERTON, J.—This action was brought by the respondent against the appellant to recover commissions claimed to be due on the sale of certain paint. In its complaint the respondent alleged an agreement between itself and the appellant whereby the appellant appointed the respondent its agent to sell its paints in a certain described territory, agreeing to pay it a commission of fifty cents per gallon on

[1]Reported in 155 Pac. 409.

all paints of the appellant sold therein. The complaint continued with appropriate allegations averring a sale in the described territory of a fixed quantity of paint, the amount due as commissions thereon pursuant to the contract, certain offsets to be deducted, and demanded judgment for the balance. For answer the appellant denied the contract, and by way of a counterclaim set up a sale of paint to the respondent for which it had not paid, a collection made by the respondent of money due the appellant for which it had not accounted, and demanded judgment for the aggregate of these sums. The action was tried to the court sitting without a jury. The court found a contract between the parties substantially as alleged in the complaint, and striking a balance between the accounts of the parties, entered a judgment in respondent's favor for the sum of $202.31. This appeal is from the judgment so entered.

The principal controversy is over the question whether there was a contract between the parties such as was set forth in the complaint. The respondent's evidence tended to show the following facts: The appellant is a corporation having its principal place of business at San Francisco, California. It deals in a roof paint, known to the trade as Remolite paint, which it sells or contracts to be sold to the consumer at a price of $1.05 or $1.10 per gallon, according to the character of the container in which it is shipped. In the year 1912, a certain lumber concern had branch yards at various points in the Yakima Valley, in this state, one of which was at Ellensburg under the management of one Gus Lindeman. This concern had a contract with the appellant under the terms of which it was able to buy the appellant's paint at prices which would net it, when sold at the consumer's price, fifty cents per gallon. In January, 1913, Lindeman organized the respondent corporation and took over the lumber concern's business at Ellensburg. With the property transferred was a small quantity of the ap-

pellant's Remolite paint. This the respondent sold, and finding a market in and around Ellensburg for the paint, wrote the appellant to that effect. No direct answer was made to his letter, but some time later the respondent received a telephone communication from the appellant's traveling salesman, one Gene Oden, from the city of Walla Walla, notifying it that the salesman would be in Ellensburg within a short time thereafter, and would take up with it the matter of its inquiry. The salesman called at Ellensburg soon thereafter, and an agreement was entered into between the appellant, represented by the salesman, and the respondent, by the terms of which the respondent was given the exclusive right to sell the appellant's paint in Ellensburg and certain surrounding territory on terms similar to those which the appellant had formerly granted the lumber concern. The respondent then had a number of customers for the paint and these, with other persons in Ellensburg, were visited on the same and the next day by the salesman and the respondent's manager and a quantity of the paint sold to them. The orders for the paint were directed to the appellant at its house in San Francisco, and the paint was subsequently shipped by the appellant directly to the persons giving the orders. The evidence tended further to show that the sales were made subsequent to the agreement, and that it was specifically agreed by the appellant's representative that they should be treated as sales under the agreement, the representative even going so far as to calculate for the respondent its profits on the sales.

The appellant's evidence appears by depositions. Its president and manager testified not only that no such contract was made with the respondent, but that the traveling salesman had no authority to make such contract. The salesman also testified to the same effect; testifying further that he made the sales for which the commission is asked, having no dealings with the respondent other than to sell it a quantity of paint.

The corroborative evidence is all with the respondent. The contract is testified to not only by the respondent's manager, but by its bookkeeper, who was requested by the manager, at the time the contract was under discussion, to search the records of the lumber company and ascertain the nature of the contract the appellant formerly had with that company. The manager also testified that he was personally present when all of the orders for the paint were taken, except in one instance, and that such sale was communicated to him shortly after it was made and the percentage thereon added to the aggregate when the salesman figured out the amount of the respondent's profit on the sales. Several of the persons to whom the sales were made also testified to the manager's presence at the time, and to the effect that he took part in the negotiations leading up to the order. It was shown also that the respondent, at the same time, gave an order through the representative to the appellant for two hundred gallons of paint, on the same forms used by the other persons. This paint was shipped with the paint shipped to supply the other orders, but while the other orders were billed at the customer's price, the order of the respondent was billed to it at substantially fifty cents per gallon less than the customer's price.

It was shown, furthermore, that, after the respondent had disposed of the original shipment, it ordered from the appellant another quantity of two hundred gallons. In answer, the appellant wrote acknowledging its receipt of the order, but declined to fill it, giving as its reason that it had noticed from the "report in detail on your firm" that its principal officers were also the principal officers of another concern; further saying: "We do not like the business methods of one of these gentlemen, so must refuse to grant your firm any more credit." In reply, the respondent wrote calling attention to the fact that it was entitled to credit for commissions in excess of the amount of its original order, and asked a reconsideration. To this letter the appellant replied:

"Lindeman Lumber Company, August 9th, 1913.
"Ellensburg,
"Washington.

"Gentlemen:—In reply to your recent favor, must say, that even after reconsidering the matter very thoroughly we still feel that it will be impossible for us to fill your order, except under the conditions mentioned in our letter of July 30th, and trust you will see your way clear to pay our invoice of May 20th, less the three per cent discount we have offered you, and on receipt of such remittances we will be pleased to ship the 200 gallons by return freight.

"We know that it is not asking too much of a firm of your size to pay this small bill and the mere fact of your complying with our request would convince us that your business methods are different from those followed by the gentleman mentioned in our former letter.

"We might remind you also that any credits that may be due for commissions are not payable to you until we have been paid by the people to whom we made direct shipment, so we cannot allow any future commissions to enter into our calculations. Yours very truly,
"Rednall Morin Co. Inc."

The respondent then wrote stating the account between them as it understood it, and demanding a check for the balance due. The appellant, for answer, wrote refusing to recognize the claim for commission, and demanding payment for the paint shipped. The evidence also showed that all of the persons to whom the paint was shipped paid the price charged to the appellant, with the exception of one who paid the account to the respondent, prior to the commencement of the present action.

It seems to us that no comment on the facts is required. It is not only clear that the appellant's representative entered into the contract contended for by the respondent, but that he made the facts known to the appellant, who filled the orders given by the third persons and the order given by the respondent with full knowledge of the nature of the terms of the agreement. There was thus not only a contract by the agent, but a ratification of the contract by the principal.

It is the settled rule that "one who voluntarily accepts the proceeds of an act done by one assuming, even though without authority, to be his agent, ratifies the act and takes it as his own with all the burdens as well as all the benefits." Mechem, Agency (2d ed.), p. 435, § 148.

It is our conclusion that the judgment should be affirmed. It is so ordered.

MORRIS, C. J., CHADWICK, MOUNT, and ELLIS, JJ., concur.

[No. 12807. Department One. February 29, 1916.]

JOHN DE LYS, *Respondent*, v. POWELL-SANDERS COMPANY, *Appellant*.[1]

MUNICIPAL CORPORATIONS—STREETS—NEGLIGENT USE—COLLISION—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. An instruction as to plaintiff's contributory negligence, when his buggy was hit by defendant's automobile, is not erroneous as indicating that, to bar a recovery, it must have been the sole cause of the accident, where the jury were told that there could be no recovery if plaintiff failed to exercise reasonable care and his negligence contributed to the producing of the collision in an appreciable degree and was the efficient and proximate cause of it; it appearing that "efficient" was used synonymously with "proximate" and was intended only as stating the necessity of a causal connection between contributory negligence and the injury.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $480 for personal injuries and damage to a buggy and harness is not excessive where plaintiff was unable to work for six weeks and sustained contusions and bruises causing considerable pain and suffering.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered November 21, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

Zent, Powell & Redfield, for appellant.

William A. Monten, for respondent.

[1]Reported in 155 Pac. 407.

FULLERTON, J.—The respondent, John De Lys, while riding in a buggy drawn by a horse along an asphalt paved street in the city of Spokane, was run into by an automobile which approached from the rear, driven by a salesman of the appellant, Powell-Sanders Company. The collision injured the buggy and harness, and threw the respondent to the pavement, causing him personal injuries. The respondent conceived that the collision was due to the negligence of the driver of the automobile and brought the present action to recover in damages for the injuries suffered. Among the defenses set up by the appellant, was that of contributory negligence. The trial resulted in a verdict and judgment for the respondent in the sum of $480.

Two errors are assigned for reversal, first, that the court erred in its instructions to the jury on the subject of contributory negligence; and second, that it erred in refusing to grant the appellant's motion for a new trial on the ground that the verdict is excessive and the result of passion and prejudice on the part of the jury.

The instructions of which complaint is made are the following:

"So that in its last analysis, the issues presented for your deliberation in this case are these: The question of whether or not the defendant company through its agent, Mr. Solomon, was guilty of negligence in the manner referred to in the complaint, and whether, if he were guilty of such negligence, such negligence on his part was the direct and proximate cause of the injuries sustained by the plaintiff in his person and property, if any. And the additional question of whether or not, at the time and upon the occasion in question, the plaintiff was guilty of contributory negligence, that is to say, whether or not he was observing reasonable and ordinary care for his own protection, and that such negligence on his part was the efficient and proximate cause of the injury, and contributed thereto in the breach of his duty.

"With respect to the doctrine of contributory negligence the duty of the plaintiff to exercise, upon the time and occasion in question, reasonable care and caution for his own

safety, is measured by the same standard. It is that degree of care which an ordinarily prudent and careful person similarly situated as shown by the evidence in this case, would have observed, and the failure to exercise such care would be negligence on his part, and if such negligence, if any, contributed to the producing of the collision in an appreciable degree, and was the efficient cause of it, then the plaintiff could not recover, although the defendant were guilty of negligence as charged in the complaint."

The appellant argues that these instructions are erroneous because they embody the idea that, to defeat recovery on the part of the respondent, his negligence must have been the sole and only cause of the injury, whereas, by contributory negligence is meant negligence in any appreciable degree on the part of the person injured which proximately and naturally contributes to his injury.

If the language used by the court, taken in its ordinary and usual acceptation, conveys the meaning imputed to it by the appellant, it is clearly erroneous, since contributory negligence, as the term itself implies, need not be, in order to bar a recovery, the sole cause of the injury of which complaint is made. But it seems to us that the language used is not susceptible of this meaning. While it is not the most happy that could have been chosen to express the idea intended, it plainly does not say in terms that the plaintiff's negligence, to bar a recovery, must have been the sole cause of the injury, as the jury are told that no recovery can be had if the plaintiff's negligence "contributed to the producing of the collision in an appreciable degree." The court, it is true, went further and told the jury that the respondent's negligence to be a bar must have been "the efficient and proximate cause of the injury, and contributed thereto," but in this it is plain that the court intended to do no more than state to the jury the necessity of a causal connection between the respondent's negligent act and the injury. A mere failure on the part of the respondent to exercise ordinary care

while driving on the street would not bar a recovery if his neglect in that respect in no way contributed to the accident. On the contrary, to quote from an authority cited by the appellant, there must have been "a proximate connection between such failure to exercise ordinary care and the injury, so direct and immediate that but for such want of ordinary care the injury would not have occurred." The appellant's principal criticism is of the use of the word efficient in this connection. But we think that the jury could not have understood it to be used other than as a synonym for proximate; and manifestly, had the word been omitted, no prejudicial error could have been grounded upon the instruction.

The second contention is also without merit. While the injuries to the respondent were not serious, still he was caused some loss in property, was unable to pursue his ordinary calling for a period of about six weeks, and suffered contusions and bruises which caused him considerable pain and suffering. The verdict is not in itself large, and we cannot say, on the face of the record, that it was so grossly disproportionate to the losses suffered as to warrant us in interfering with it.

The judgment is affirmed.

MORRIS, C. J., MOUNT, CHADWICK, and ELLIS, JJ., concur.

[No. 12840. Department Two. February 29, 1916.]

O. A. KUCK, *Appellant*, v. CITIZENS' INSURANCE COMPANY, OF MISSOURI, *Respondent*.[1]

INSURANCE—FIRE POLICY—PROOFS OF LOSS—NECESSITY. The making of proofs of loss by fire within sixty days, as required by the Washington standard form of policy, is a condition precedent to action unless such failure is due to a misleading of the insured by officers of the company.

SAME—PROOFS OF LOSS—WAIVER. The requirement of proofs of loss within the time specified in the policy is not waived by the fact that an insurance agent and the adjuster investigated a fire loss in the absence of the insured and that the agent told the insured the adjuster would adjust the loss.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered November 16, 1914, in favor of the defendant, dismissing an action on a policy of fire insurance, tried to the court. Affirmed.

Hibschman & Dill (*C. H. White*, of counsel), for appellant.

McCarthy, Edge & Davis, for respondent.

MAIN, J.—The purpose of this action was to recover upon an insurance policy for the damage or destruction of property by fire. The trial in the superior court resulted in a judgment of dismissal after the defendant, at the conclusion of the plaintiff's testimony, had interposed a motion for a directed verdict. From the judgment dismissing the action, the plaintiff appeals.

The facts are these: On May 9, 1913, the respondent, through Howard Patience, its agent at Wenatchee, Washington, issued to Charles F. McMullen, of Grant county, a policy of insurance covering a dwelling house, a pumping station, and pumping plant, the latter two being insured for $300 and $1,000, respectively. The property covered by the

[1]Reported in 155 Pac. 406.

insurance was located on a tract of land about eight miles from Ephrata.

On October 6, 1913, the pumping station and plant were destroyed by fire. The insured, by letter, notified the head office of the insurance company, which was located in the state of Missouri, of this fact. A few days thereafter Neil Stewart, an adjuster for the insurance company, together with Patience, went to the farm of the appellant and made an investigation of the loss. The appellant was not present when the investigation was made, though he had previously been notified of the approximate time when Stewart and Patience would be there.

The insurance policy was a Washington standard form of policy, and contained a provision that required the insured to make proof of loss "within sixty days after the fire unless the time is extended in writing by this company;" and also contained a provision that no suit or action on the policy could be maintained "until after full compliance by the insured with all of the foregoing requirements."

On October 31, 1913, McMullen assigned his claim against the insurance company to the appellant. Neither McMullen nor the appellant filed formal proofs of loss with the insurance company until after the sixty-day period fixed in the policy had expired. On December 9, 1913, Stewart, the agent of the company, denied liability.

Previous to the time the policy was issued, McMullen had given two deeds covering the property, one for forty acres to Ada Hogle, dated October 6, 1911; and another to Wells & Morris, of Wenatchee, dated July 25, 1912, for the remaining one hundred and twenty acres. The buildings and pumping plant were located on the latter tract. The deed to Wells & Morris was given as security. McMullen retained control over the land and had a contract back of purchase. At the time the insurance was written, the condition of the title to the property was not disclosed. McMullen testified

that, when the insurance was applied for, Patience asked him if the property belonged to him and was told that it did; but that he did not ask whether the property was in his name.

Stewart never at any time communicated with McMullen after he had inspected the property. There was no waiver in writing of the proofs of loss required by the policy; and nothing was ever said, either to McMullen or to the appellant, relative to waiving such proofs.

The controlling question is whether the insured's failure to present the proofs within the time specified in the policy was due to any misleading on the part of the insurance company. The rule is well settled in this state that the making of proof of loss as required by the policy is a condition precedent to the maintenance of an action, unless failure to present proofs is due to a misleading of the insured by the officers or agents of the insurance company. *Davis v. Pioneer Mut. Ins. Ass'n*, 44 Wash. 532, 87 Pac. 829; *Davis v. Northwestern Mut. Fire Ass'n*, 48 Wash. 50, 92 Pac. 881; *Seattle Merchants Ass'n v. Germania Fire Ins. Co.*, 64 Wash. 115, 116 Pac. 585. We find no evidence in the record in this case of any misleading. The fact that the adjuster investigated the loss a few days after it occurred, in the absence of McMullen, cannot be construed as a waiver of the express provision of the policy requiring proof of loss. It would seem that the purpose of this proof is to furnish a working basis upon which the loss can be adjusted.

It is true that, a few days after Patience and Stewart made the investigation, McMullen called upon Patience in Wenatchee and was there told by Patience that Stewart would adjust the loss. But there is nothing in this that could be construed as misleading, even though Patience had the power to speak for the company, which apparently he did not. Had the insurance company, within the sixty days, repudiated liability, and this fact had been communicated to the insured, a different question would be presented. *Thompson v. Germania Fire Ins. Co.*, 45 Wash. 482, 88 Pac. 941.

Upon the question as to whether the condition of the title to the property at the time the insurance was written and which was not disclosed, rendered the policy invalid, it is not necessary here to inquire, as the failure to furnish the proofs within the time specified is fatal to the maintenance of the action.

The judgment will be affirmed.

MORRIS, C. J., PARKER, BAUSMAN, and HOLCOMB, JJ., concur.

[No. 13003. Department Two. February 29, 1916.]

CANADIAN PACIFIC RAILWAY COMPANY, *Appellant*, v. KING COUNTY *et al.*, *Respondents*.[1]

TAXATION—PROPERTY SUBJECT—RAILROAD ROLLING STOCK—STATUTES—CARS OF FOREIGN COMPANY—SITUS. Where a foreign railroad company had an operating agreement with a company having a railroad line in this state, whereby three of its through eastern passenger cars were, each day, taken at the state boundary line and run through several counties of this state to the city of S. and returned, under a profit sharing agreement, the cars are assessable for taxation as the property of the foreign company, either as operating railroad property, or as ordinary personal property, under Rem. & Bal. Code, § 9142, subd. 3, providing that "property of the railroad company" as used in the chapter relating to taxation "shall include all . . . rolling stock equipment . . . used or employed in the operation of the railroad or in conducting its business," and 3 Id., § 9152, providing that "the rolling stock and other movable property belonging to any railroad company or corporation, shall be considered personal property and shall be assessed and taxed as such;" since the first section, giving the state tax commissioners power to assess railroad operating property, is not confined to railroad companies having lines in this state, and under the last section, the foreign company maintained the situs of the cars in this state, although the same three cars are not continuously in the state (BAUSMAN, J., dissenting).

[1]Reported in 155 Pac. 416.

SAME—APPORTIONMENT TO COUNTIES. The state tax commission has supervisory power to direct the assessment and distribution of a railroad company's rolling stock ratably among the several counties in which it is used.

Appeal from a judgment of the superior court for King county, Jurey, J., entered August 5, 1915, in favor of the defendants, upon an agreed statement of facts, in an action to enjoin the collection of a tax. Affirmed.

Bogle, Graves, Merritt & Bogle, for appellant.

The Attorney General and *Edward W. Allen, Assistant*, for respondents.

HOLCOMB, J.—In this action appellant sought to cancel and annul the taxes against its property in King county and make a test case as to taxes not only in King county but also in the counties of Snohomish, Skagit, and Whatcom. The case was tried upon an agreed statement of facts, and judgment rendered in favor of respondents. On March 1, 1913, the state board of tax commissioners undertook to find and determine the value of appellant's railroad property subject to taxation within the state at that time; found personal property which it determined to be of the value of $139,000, and thereafter prepared assessment rolls and entered that sum thereon as the value of appellant's property. Afterwards the state board of equalization equalized this value for taxation purposes at the sum of $52,905, and apportioned that value to the various counties above named into and through which passenger cars of appellant, assessed as stated, were hauled, according to the classification and value thereof, in such proportion to the entire value thereof as the length of the line in each of the counties bore to the entire length of the line between Seattle and Sumas. The sum of $10,847 was apportioned by the state board to King county as the equalized value of appellant's railroad property, equipment, and rolling stock assessable within King county.

Appellant is a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, and during all the times herein mentioned has owned, maintained, and operated a line of railway within the Dominion of Canada. On or about June 1, 1912, appellant made and entered into a certain written contract with the Northern Pacific railway company, a copy of which is attached to and made a part of the respondents' answer herein, and on March 1, 1913, when the purported assessment was made, this contract was in full force and effect. Under and by virtue of the contract, in the conduct of transcontinental passenger traffic, appellant daily delivers to the Northern Pacific company at Sumas, on the international boundary line, three cars of its regular transcontinental trains, consisting of a standard sleeping car, a tourist sleeping car, and a dining car. The Northern Pacific company hauls these cars over its own track in its train from Sumas to Seattle daily, and returns them the next day from Seattle to Sumas, where they are delivered to the appellant and placed in one of its regular transcontinental trains. The object of this arrangement is obviously to obtain passenger traffic between Puget Sound points and the East by giving continuous passage in either direction without change of cars, sleepers or diner. The Northern Pacific train crews handle the cars within the state of Washington.

It is undisputed that appellant is the actual owner of the three passenger cars involved in this controversy. It is undisputed that the amount of the tax, so far as the value of appellant's property is concerned, is not questioned in this proceeding, and that there is no inequality as to the ratio or amount between such assessment and the assessment of other property in King county.

The contentions of appellant are briefly these: That the tax assessed is a claim against appellant collectible, if valid, out of any of its property, and not merely a tax on account of the value of these particular cars; that the tax, as a tax against appellant on account of these cars, is invalid for

three reasons, viz.: (1) Because appellant's domicil is in Canada and, for taxation purposes, all its personal property, including these cars, had a situs in Canada, and was assessable against it only in Canada, unless, by reason of permitting the Northern Pacific company to haul these cars in this state under the contract in question, it gave the cars a situs also in this state as its property; (2) that even if the legislature had power to provide for the assessment of these cars as appellant's property and the collection of a tax thereon, nevertheless the law in this state authorized an assessment by the state board of railway cars only as operating railroad property of a railway company owning or operating a line of railway in this state, and that, under the undisputed facts, it was not such an operating railroad within this state; and (3) that, even if appellant were mistaken in both of the foregoing claims, still the state board, in making the assessment in question, clearly failed to comply with the mandatory requirements of the law relative to levying such assessments, so as to make the one in question void.

Appellant concedes that, if this property is operating property, the tax might be levied upon it against the Northern Pacific company, which it claims actually used and operated cars within the state and which, under the express terms of the statute, was the owner of the cars for the purpose of taxation.

The contract between the Canadian company and the Northern Pacific company provides, in substance, that at least one daily passenger train shall be run each way between Sumas and Seattle to haul the Canadian company's equipment from and to points in the East, such train to be timed to connect at the transfer point—Sumas—with the express train of the Canadian company; that each company shall handle the trains on its own lines by its own employees and at its expense; that berth or seat earnings in sleeping, parlor, or similar cars shall belong to the company furnishing the

cars; that no charge shall be made for transfer at the transfer point, but the receiving company shall perform the transfer free of charge to the other company. Other terms of the contract provide for divisions of traffic and interchange between points beyond the line of either of the contracting companies upon certain specified basis. Under these conditions, appellant claims that it is not an operating railroad company within the state of Washington, and therefore does not come within the provisions of § 8 of the act of 1907, giving the state board of tax commissioners power to assess railroad operating property; that, if these cars are to be considered operating property, they must be considered as the property of the Northern Pacific railway company and assessed to it; that, if considered as mere chattels or personal property, they have no situs within the state of Washington.

The case of *Hays v. Pacific Mail Steamship Co.*, 17 How. 596, is cited as in point, where the question involved was the right of the state of California to assess an ocean steamer owned and registered in New York and regularly plying between Panama, San Francisco, and ports in Oregon, remaining in San Francisco no longer than was necessary to land and receive passengers and freight. The case of *Bain v. Richmond & D. R. Co.*, 105 N. C. 363, 11 S. E. 311, 18 Am. St. 912, 8 L. R. A. 299, is also cited to the effect that cars used by a railway company in interstate commerce over a line of railway leased and operated by it in the state of North Carolina were not subject to taxation within that state. We do not regard these cases as strictly in point. In the first case cited, obviously, ocean vessels, having their situs fixed by act of Congress and their course over navigable waters, and touching land only incidentally and temporarily, have no such situs as would authorize local taxation; and cars or vehicles merely passing through one state, although regularly, would be similarly situated. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18.

We regard the general rule to be that tangible personal property is subject to taxation by the state in which it is, no matter where the domicil of the owner may be.

"It is equally well settled that there is nothing in the constitution or laws of the United States which prevents a state from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction." *Pullman's Palace Car Co. v. Pennsylvania, supra.*

See, also, *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299.

In *Passenger Cases*, 7 How. 283, at page 402, it was said:

"A state cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce the same as other property owned by its citizens."

These principles were approved and reaffirmed in effect in the following cases: *Western Union Tel. Co. v. Taggart*, 163 U. S. 1; *Adams Express Co. v. Ohio State Auditor*, 166 U. S. 185; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70; *New Orleans v. Stempel*, 175 U. S. 309; *Bristol v. Washington County*, 177 U. S. 133; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149; *Atlantic & Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160; *Kehrer v. Stewart*, 197 U. S. 60; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194.

We consider the situation existing in this case somewhat similar to that in the case of *Pullman's Palace Car Co. v. Pennsylvania, supra.* In that case, it is true, the state imposed a tax on the capital stock of all corporations engaged in the transportation of freight and passengers within the state, under which the Pullman company, engaged in running railroad cars into, through, and out of the state, and having at all times a large number of such cars within the state, was taxed by taking as a basis of assessment such pro-

portion of its capital stock as the number of miles of railroad over which its cars are run within the state bore to the whole number of miles in it and other states over which its cars were run, instead of basing the tax directly upon chattels or personal property. In that case it was stated:

"The cars of this company within the state of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the state; and the state has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the state could tax them, like other property, within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, can not affect the power of the state to levy a tax upon them. The state, having the right, . . . could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the state, particular cars may not remain within the state; but the company has at all times substantially the same number of cars within the state, and continuously and constantly used there a portion of its property: . . ."

So, in the present case, it is conclusively established that appellant owns three cars which are regularly used and employed in railroad business within this state and within and traversing the counties heretofore mentioned. It is true that identically the same cars are not used continuously, but the same number of cars are used daily. They are operated in much the same manner as the Pullman company's cars were operated by railroads in the state of Pennsylvania. Under the contract, the Northern Pacific company may be deemed to be the agent and partner of the Canadian company in operating its cars within the state of Washington for a portion of the earnings of the cars, the Canadian company own-

ing and furnishing the cars and the Northern Pacific company owning and furnishing the railway track and carrying the cars back and forth for the Canadian company. It cannot be justly asserted that the Canadian company derives no profit from the use and operation of the cars. It is patent that it does not merely loan the cars to the Northern Pacific company for the accommodation of the latter. It undoubtedly derives a steady revenue from the use and operation of the cars. It would be immaterial whether or not it derived any profit whatever if its personal property became incorporated in the mass of personal property within this state. Neither do we consider it material whether this property is to be assessed as railroad operating property or as merely personal chattels. The object to be attained by requiring the assessment of railroad property operating partly within this state and partly within other states was to distribute the taxes of the assessed operating company equitably so as not to compel the operating company to pay excessive, unjust, or double taxes, and also to avoid putting an undue burden and restraint upon interstate commerce. The result obtained here is the same.

The statute which has been referred to, Rem. & Bal. Code, § 9142, subd. 3 (P. C. 501 § 283), is as follows:

"The term 'property of the railroad company' as used in this chapter, shall include all franchises, right of way, roadbed, tracks, terminals, rolling-stock equipment and all other real and personal property of such company, used or employed in the operation of the railroad, or in conducting its business, and shall include all title and interest in such property, as owner, lessee or otherwise. . . ."

It is undisputed in this case that the cars in question are rolling stock or personal property the title to which, so far as the record shows, is wholly in the Canadian company. The Northern Pacific company is not the lessee or the owner, and has no interest in the cars in controversy except as joint operator.

Another statutory provision, Rem. & Bal. Code, § 9152, as amended, is as follows:

"And the rolling stock and other movable property belonging to any railroad company or corporation shall be considered personal property and shall be assessed and taxed as such." 3 Id., § 9152.

Under either statute, we consider that the state tax commission has the right to assess the cars in question—either as operating railroad property or as ordinary personal property—to the true owner thereof, the Canadian company, which maintains the situs of the cars in this state.

The state tax commission also had supervisory power to direct the assessment and its distribution among the several counties ratably. *Great Northern R. Co. v. Snohomish County*, 48 Wash. 478, 93 Pac. 924; *Great Northern R. Co. v. Snohomish County*, 54 Wash. 23, 102 Pac. 881; *Northern Pac. R. Co. v. State*, 84 Wash. 510, 147 Pac. 45.

It does not seem necessary to further incumber this decision with authorities. The assessment was legal, and the judgment of the lower court was right and is affirmed.

MORRIS, C. J., PARKER, and MOUNT, JJ., concur.

BAUSMAN, J. (dissenting)—That the Canadian Pacific company had property within this state subject to taxation is plain, for if it did not operate the cars it at least owned them, and had they been destroyed by a mob it would undoubtedly have invoked recompense from our local authorities. Taxes are tribute exacted for protection bestowed.

But it does not follow because these cars could have been taxed that they have been properly taxed. They were railway property and, being such, could be taxed only in the way prescribed by statute, which, in my opinion, has not been done in the present instance. Since this railway's property is "partly within and partly without the state," the statute plainly commands the taxing authorities to proportion the volume of property within Washington to what was outside

of it. The quoted end of 3 Rem. & Bal. Code, § 9152, was not, in my opinion, intended to let the board ignore, in assessing rolling stock, the distinction between within-state and interstate railways. For that clause there were other uses, such as the date and manner of enforcing the taxes unpaid. The authority of the board rested only in the statute. It cannot be even said that, upon my view, the legislature left these cars open to escape taxation. Not only could they have been assessed on the interstate basis to the Canadian Pacific company, but if there was any doubt about that they could, under the plain law, have been assessed to the company that was manifestly operating them, the Northern Pacific railway company.

I therefore dissent.

[No. 13050. Department One. February 29, 1916.]

JOHN M. BOLCH, *Appellant*, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Respondent*.[1]

MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE OR ASSUMPTION OF RISKS. A question of contributory negligence, and not assumption of risks of defective appliances or place of work, under the Federal employers' liability act, arises where a switchman rode on a flat car bending over in an insecure position to uncouple cars, when he was thrown from the car through the negligence of the switch foreman in failing to turn the switch.

SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. It is for the jury to determine whether it was inherently dangerous for a switchman, in making a flying switch, to ride upon a flat car with his feet in the stirrup, and holding to a cleat, and bending over in an insecure position to uncouple the cars.

DAMAGES—PERSONAL INJURIES — PROXIMATE CAUSE — EVIDENCE — QUESTION FOR JURY. Whether plaintiff had tuberculosis of the spine, and his fall was the predisposing cause, is a question for the jury where three of seven physicians testified that he had that disease and attributed his condition to the fall.

[1]Reported in 155 Pac. 422.

MASTER AND SERVANT—INJURIES TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—CONSTRUCTION. The Federal employers' liability act is remedial and is to be liberally construed as to the inclusion of its beneficiaries in order to effect its remedial purpose.

COMMERCE—"INTERSTATE COMMERCE"—QUESTION FOR JURY. Where the facts relating to the service of a railroad employee are not conceded or established by proof so conclusive that there can be no reasonable difference of opinion about them, whether he was engaged in state or interstate commerce is a question for the jury under proper instructions.

SAME—"INTERSTATE COMMERCE"—WHAT CONSTITUTES. Where, in order to move repaired empty cars from the repair track in a switch yard, it was necessary to move and replace three unrepaired cars, one of which was loaded with lumber destined to a point in another state, the movement of such loaded car by a switching crew is a service rendered in the movement of interstate commerce, within the Federal employers' liability act; since the repair and every movement of such loaded car was an incident necessary to its furtherance on its journey.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered July 9, 1915, upon the verdict of a jury rendered in favor of the defendant, in an action for personal injuries sustained by an employee in switching cars. Reversed.

Gordon & Easterday and *G. C. Nolte*, for appellant.

Geo. W. Korte and *H. S. Griggs*, for respondent.

ELLIS, J.—Action under the Federal employers' liability act to recover damages for personal injuries. Plaintiff was employed by defendant as a member of a night switching crew in its yards at Tacoma. The crew consisted of a foreman, the plaintiff and another. On a night late in August or early in September, 1913, this crew was engaged in removing from the repair tracks, located at one end of the yard, repaired empty cars, leaving on the repair tracks other cars to await repair. The repaired cars were being taken over a lead track from the repair tracks to storage tracks at the other end of the yard, there to remain till used by another switching crew in making up trains. The repair

tracks are used indiscriminately for loaded and empty cars employed in both interstate and intrastate commerce. There are several of these repair tracks, all converging to a connection with the lead track. At the time in question, there were on repair track No. 1 several cars, some of which had been repaired, while others had not. Nearest the switch opening on the lead track were some ten cars which had been repaired. Back of these were three unrepaired cars, and still back of these were other repaired cars.

For the purpose of getting out all of the repaired cars, the switching crew attached the engine to the first repaired cars and the three unrepaired cars and hauled these out onto the lead track with the intention of backing up and "kicking" the three unrepaired cars onto repair track No. 2 which was apparently empty, and then taking up the repaired cars remaining on track No. 1. In attempting to kick the three unrepaired cars onto track No. 2, the foreman, whose duty it was to turn the switch, admittedly failed to do so. The string of cars went back upon the track whence they came, and ran against the remaining empty cars on that track. The impact threw plaintiff from the side of a flat car on which he was riding in a leaning posture in the act of uncoupling to complete the intended kick in response to the foreman's signal. He claims that he fell with his back across the rail of an adjoining track and was so injured as to induce tuberculosis of the spine.

There was evidence warranting the inference that when trains arrive in the railroad yard the cars are inspected and carded with their destination, for the information of the switching crews in breaking up the trains and distributing the cars. Plaintiff testified that one of the three unrepaired cars which were being cut out was a box car loaded with dressed lumber, bearing a card giving the number of the car and its destination as Aberdeen, South Dakota. He claims that he noticed this fact particularly because some of the lumber, by reason of the jar, broke through and pro-

truded from the end of the car, and that when the foreman came to help him up after his fall he called attention to that fact. The foreman and the other member of the crew expressed the belief that none of the cars was loaded. It is conceded that the defendant is a corporation engaged in interstate commerce. The negligence alleged was the failure of the foreman to turn the switch. Defendant, by answer, admitted the plaintiff's employment, denied negligence and set up, as affirmative defenses, contributory negligence and assumption of risk. These were traversed by reply. Verdict and judgment were for defendant. Plaintiff appeals.

Appellant resolutely assails the court's instructions as erroneous. Respondent combats this view and insists that, in any event, they were immaterial, in that (1) appellant assumed the risk; (2) there was no proof of injury. Preliminary to a discussion of the instructions, we shall consider these claims.

Respondent argues that the appellant assumed the risk of being thrown from the flat car upon which he was riding, because he must have known that, standing with his feet in the stirrup, bending over and holding to a cleat on the floor of the car, was an insecure position. Such was in fact his position; but a statement of the claim makes it manifest that the question was one of contributory negligence rather than assumption of risk. Respondent cites *Seaboard Air Line R. v. Horton*, 233 U. S. 492, Ann Cas. 1915 B. 475, L. R. A. 1915 C. 1, which holds that the employers' liability act does not abrogate the defense of assumption of risk as it does that of contributory negligence, except in case of a violation of some Federal statute enacted for the protection of employees. In that case the risk held assumed was of an obviously defective water gauge which exploded and caused the injury. Here there was no defect in the flat car, nor in its coupling, nor in any other appliance. Whether it was inherently dangerous to ride upon the flat car as appellant did instead of walking, as his foreman said he should have done, was

a question for the jury. We cannot say, of riding in that position instead of walking, that, as a matter of law, the minds of reasonable men might not differ as to its imprudence. In any event, the question was one of contributory negligence, not the assumption of risk of an obviously defective appliance or place of work not attributable to negligence independently of some Federal statute, which is all of the assumption of risk as at common law left unmitigated by the employers' liability act. This distinction is elaborately pointed out and explained in the opinion cited. See pages 501 to 504, inclusive. See, also, *Lauer v. Northern Pac. R. Co.*, 83 Wash. 465, 145 Pac. 606. The court gave correct instructions covering both assumption of risk and contributory negligence and their effect under the statute. Upon the evidence, both questions were for the jury.

As to appellant's injuries, there is no doubt that he fell by reason of the impact of the cars. The evidence, however, casts some doubt upon his claim that he fell with his back across a rail. As to his condition, three physicians who examined him prior to the trial testified that he was suffering from tuberculosis of the spine affecting two of the vertebrae, and attributed his condition to the fall as a predisposing cause. Three other physicians who examined him testified that he was suffering at the time of the trial from rheumatoid arthritis, caused by an infection from a diseased mouth and teeth, or from an old gonorrheal trouble which his personal history discloses. The general surgeon of the respondent, in response to hypothetical questions, expressed the same opinion. Whether he was in fact suffering from tuberculosis of the spine induced by the fall was a question for the jury. Where seven learned doctors cannot agree, we would hardly be warranted in saying that the minds of reasonable men may not differ as to the cause and diagnosis of the man's condition.

The court, after defining interstate commerce and intrastate commerce in general terms and telling the jury that the

appellant could not recover unless, at the time of his injury, he was employed in interstate commerce, gave an instruction as follows:

"If, on the other hand, you find that the movement of the cars at the time plaintiff was injured, was not for the purpose of furthering or aiding in the forwarding of the car or cars so loaded for a destination, outside the state on its journey towards such destination, but was merely for the purpose of moving said car or cars off one track to another in the same yard, or for the purpose of taking said car or cars out of the track on which they stood in order that the switching crew might take out other cars out of the same track, and afterwards put back the cars so loaded in to the same or another track where they would remain for the same purpose for which they were originally placed in the yard and that the real purpose of the movement of cars at that time was to enable the switching crew to keep certain empty cars then located on the repair tracks of the said company that they might transfer them to another yard of the company where they would be subject to any use to which the company might later designate them, then I instruct you that the plaintiff was not at the time engaged in interstate commerce, and that the movement of the cars in which they were engaged was not for the purpose of furthering or aiding the operations of interstate commerce, and the plaintiff cannot recover in this action for any injuries he may have received by falling from the car in the manner he alleges."

The giving of these instructions is assigned as the sole ground of error. Manifestly, the last was tantamount to an instruction that, upon the facts shown, the appellant could not recover. The history of the employers' liability act and its remedial purpose impel to the conclusion that it should be liberally construed as to the inclusion of its beneficiaries in order to effect its remedial purpose, notwithstanding the fact that it is in derogation of the common law. *Johnson v. Southern Pac. Co.*, 196 U. S. 1; *Colasurdo v. Central R. R. of New Jersey*, 180 Fed. 832; *In re Second Employers' Liability Cases*, 223 U. S. 1, 38 L. R. A. (N. S.) 44; *Horton v. Oregon-*

Washington R. & Nav. Co., 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8.

When the employer is engaged in interstate commerce by railroad, the specific labor in which the employee is engaged at a given time takes its character as a part of state or interstate commerce, not from the nature of his general employment nor from the nature of the specific work, but from the relation of that work to interstate commerce. The same specific act with one set of concomitants may be a part of interstate commerce, and with another set a part of intrastate commerce. The same employee, without the slightest change in the intrinsic nature of his habitual tasks, may pass many times daily from employment in one kind of commerce to the other. *New York Cent. & H. R. R. Co. v. Carr*, 238 U. S. 260. Each case, therefore, must depend upon its peculiar facts. When these are conceded, or established by proof so conclusive that there can be no reasonable difference of opinion, the question is one for the court. When not so conceded or conclusively established, the question is one for the jury under proper instructions. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, Ann Cas. 1914 C. 159; *Pennsylvania Co. v. Donat*, 239 U. S. 50.

In passing upon the sufficiency of the instructions, therefore, we must assume that one of the three unrepaired cars which were being replaced upon the repair track was loaded with lumber for South Dakota. There was competent evidence tending to establish that fact. The question of fact was for the jury. If so loaded, that fact fixed its status for the time as an interstate car. The interstate transportation, to which it was then devoted, was not ended merely because the car had become temporarily disabled and was placed upon the repair track where it was awaiting its turn for repairs. While so placed and waiting, it was still in interstate commerce. *Johnson v. Southern Pac. Co.*, 196 U. S. 1; *Great Northern R. Co. v. Otos*, 239 U. S. 349. The repairing of an interstate car, engine or tender, essential to its interstate progress, is as

much a part of interstate commerce as its subsequent progress. *Northern Pac. R. Co. v. Maerkl*, 198 Fed. 1; *Darr v. Baltimore & O. R. Co.*, 197 Fed. 665; *North Carolina R. Co. v. Zachary, supra; Walsh v. New York, N. H. & H. R. Co.*, 223 U. S. 1, 38 L. R. A. (N. S.) 44.

It was essential to its future progress that this car remain upon the repair track until repaired. Every movement of it necessary to its so remaining was an incident to its furtherance on its journey. To get out the repaired empty cars, this car had to be removed from and returned to the repair track. It is self-evident that this was as much a part of its movement in interstate commerce as was its movement onto the repair track in the first place. Though there is no case an exact parallel on the facts, there are several recent decisions of the Federal courts which we apprehend fix the controlling principle.

The Federal supreme court recently held that a brakeman on a train consisting of both interstate and intrastate cars, who was injured while on one of two intrastate cars which he was assisting in cutting out of the train to leave them on a siding in order, as the court said, that the train might proceed, was then so employed in interstate commerce that he could maintain an action under the employers' liability act. The court said:

"The scope of that statute is so broad that it covers a vast field about which there can be no discussion. But owing to the fact that, during the same day, railroad employes often and rapidly pass from one class of employment to another, the courts are constantly called upon to decide those close questions where it is difficult to define the line which divides the state from interstate business. The present case is an instance of that kind—and many arguments have been advanced by the railway company to support its contention that, as these two cars had been cut out of the interstate train and put upon a siding, it could not be said that one working thereon was employed in interstate commerce. But the matter is not to be decided by considering the physical position of the employe at the moment of injury. If he is hurt in the

course of his employment while going to a car to perform an interstate duty; or if he is injured while preparing an engine for an interstate trip he is entitled to the benefits of the Federal Act, although the accident occurred prior to the actual coupling of the engine to the interstate cars. *St. Louis &c. Ry. v. Seale*, 229 U. S. 156; *North Carolina R. R. v. Zachary*, 232 U. S. 248. This case is within the principle of those two decisions." *New York Cent. & H. R. R. Co. v. Carr*, 238 U. S. 260.

The court, after distinguishing *Illinois Cent. R. Co. v. Behrens*, 233 U. S. 473, Ann. Cas. 1914 C. 163, to which we shall presently refer, concludes:

"Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury, the employe is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof."

That case cannot, on sound principle, be distinguished from this. The compelling purpose of switching the two intrastate cars onto the side track was to leave them at their destination, not merely to let the interstate train proceed. Obviously the train could have proceeded without leaving these cars. The court emphasizes the progress of the interstate train merely to show the relation of the switching of the two intrastate cars to interstate commerce. The purpose being double, the court looked to the circumstance which touched interstate commerce. Suppose they had been interstate cars and the only interstate cars in the train, and were being left there for repairs, to be picked up by another engine when repaired. Could there be any doubt that the court would still have held that the injured brakeman was employed at the time in interstate commerce? We think not, yet such a case would be a parallel with this. In the case supposed, it matters not how they became commingled with the other cars. The point is that they had to be segregated and left for repair in aid of their function in interstate commerce.

In *Pennsylvania Co. v. Donat, supra*, the same court, on November 1, 1915, held that, where there was evidence tending to show that a yard conductor was injured while engaged with a switching crew in removing two empty cars from a private switch in order to place thereon two cars from without the state loaded with coal consigned to the owner of the track, the question whether he was engaged in interstate commerce at the time of the injury was one for the jury under proper instructions. An appeal on the ground that the trial court had refused to instruct that he was not so engaged was dismissed as frivolous.

While that case differs from this in the circumstance that the movement of the empty cars was for the purpose of placing interstate cars, the difference seems immaterial. Here the movement of the two empty cars and the loaded car was not only to get out the repaired cars, but to replace this car that it might await the repairs necessary to its interstate journey. As in the *Carr* case, the purpose being composite, we look to the factor touching interstate commerce. Obviously, but for the presence and necessity of moving this loaded car, the appellant's employment would not have been in interstate commerce. The case would have been clearly ruled by the decision of the Federal supreme court in *Illinois Cent. R. Co. v. Behrens*, 233 U. S. 473, Ann. Cas. 1914 C. 163, which is mainly relied upon by respondent. In that case a train of cars all loaded with intrastate freight was being moved from one point to another in the same state. This, of course, was held not a service in interstate commerce. It was also held that the fact that the deceased was expected, on the completion of that task, to enter another which would have been a part of interstate commerce did not alter his status at the time of the accident. In that case, however, had there been in the train a single car loaded with interstate freight a different question would have been presented and, as demonstrated in *New York Cent. & H. R. R. Co. v. Carr, supra*, the result would have been different. Even in the *Behrens* case

it is intimated that the intention of the statute is to cover every service which "isolatedly considered" touches interstate commerce. In *St. Louis, S. F. & Tex. R. Co. v. Seale*, 229 U. S. 156, Ann. Cas. 1914 C. 156, a yard clerk, whose duty it was to check, take the numbers of and put cards on incoming cars to guide the switching crews in breaking up trains both intrastate and interstate, was killed by an engine while he was going to meet a train. It was held that his representative was entitled to maintain an action for his death under the Federal act. See, also, *North Carolina R. Co. v. Zachary, supra.*

The other Federal cases cited by respondent in support of the claim that the appellant was not engaged in interstate commerce are equally inapposite with the *Behrens* case. In *Heimbach v. Lehigh Valley R. Co.*, 197 Fed. 579, the car, in repairing which the plaintiff was injured, had reached the end of its run, had been unloaded and was waiting orders. In *Feaster v. Philadelphia & R. R. Co.*, 197 Fed. 580, the plaintiff, an extra conductor, was ordered to report for work, but had not been assigned to any particular service. He was injured while riding on a light engine to report for work within the same state. The case of *United States v. Chicago, M. & P. S. R. Co.*, 219 Fed. 632, involved the hours of service law. The plaintiff was an employee on a work train engaged in filling a bridge on defendant's interstate line. It was held that he was not then "engaged in the movement of interstate commerce." The decision is doubtless sound as applied to the hours of service law, but if the action had been brought under the employers' liability act it would be in direct conflict with the decision of the Federal supreme court in *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, Ann. Cas. 1914 C. 153.

We shall not review the many decisions of the state courts cited by respondent, since, in any event, we are bound by the Federal decisions, and especially the recent decisions of the United States supreme court upon the subject. These seem

to us to evidence an intention so to construe the statute as to make it apply in all cases where injury occurs to an employee in connection with any movement of cars incidental to or rendered necessary by the presence on the tracks of an interstate commerce carrier of a car loaded with interstate freight between the place of its reception by the interstate carrier and the place of its destination. Measured by this rule, there can be no question that the court's instruction was erroneous.

The appellant requested an instruction as follows:

"You are instructed that if you find from the evidence that among the cars in the string that was being moved by the switching crew or train men of the defendant, at the time Bolch was injured, if he was injured, there was a box car loaded with dressed or finished lumber destined for Aberdeen, South Dakota, or some other point without the state of Washington, which car had been actually started for its destination or the lumber in which had theretofore been delivered to the defendant for transportation to Aberdeen, South Dakota, or to some other point without the state of Washington, then I charge you that the plaintiff was employed in interstate commerce at the time of receiving such injury. And, if his injury resulted in whole or in part from the negligence of any of the employees of the defendant, the defendant is liable in damages and your verdict should be for the plaintiff."

While the requested instruction would have been better had it been more circumstantial in embodying the rule which we have deduced from the authorities, it sufficiently expressed that rule as applied to the fact. It, or some other instruction involving the same thought, should have been given. The failure to give it was fatal error.

The judgment is reversed, and the cause is remanded for new trial.

MORRIS, C. J., FULLERTON, and CHADWICK, JJ., concur.

[No. 13163. Department One. February 29, 1916.]

ANNA F. FRESCOLN, *as Administratrix etc., Appellant*, v. PUGET SOUND TRACTION, LIGHT & POWER COMPANY, *Respondent*.[1]

JUDGMENT—ENTRY—NON OBSTANTE—TIME FOR MOTION—RECORD—MINUTE RECORD—PRESUMPTIONS. Where the clerk's minutes show a motion for judgment *non obstante veredicto* before judgment was entered, and do not show that it was passed upon, his minute entry of judgment is not a judgment, it being presumed that judgment was held in abeyance pending formal ruling, especially where the court notes the informality in the formal judgment reciting that judgment was so held in abeyance; hence the record shows a timely motion for judgment *non obstante*.

CARRIERS—INJURY TO PASSENGERS—SETTING DOWN PASSENGERS—NEGLIGENCE—DEATH—QUESTION FOR JURY. The cause of the death of a passenger alighting from a pay-as-you-enter street car, is not left entirely to speculation or conjecture, but is, with the negligence of the company, a question for the jury, where deceased was seen on the rear platform of the car when the car was being brought to a stop, and was next seen lying in the street about fifteen feet in the rear of the car, and the conductor was seen to reach up and ring the bell, and go back and pick him up, he having suffered injuries from which he died; since the movement of the passenger alighting from such a car with gates is under the control of the conductor, whose duty it was to hold the car until he had safely alighted, and the violence and circumstances of the fall make it more probable that the deceased did not fall in consequence of his negligence, but rather that he was thrown by a violent starting of the car.

SAME. The fact that the deceased was seen to fall headlong, instead of behind the car, does not take from the jury the question whether the accident was physically impossible from negligently starting the car.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered April 9, 1915, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Reversed.

Thos. H. Bain, for appellant.

James B. Howe and *H. S. Elliott*, for respondent.

[1]Reported in 155 Pac. 395.

CHADWICK, J.—Appellant brought this action against the respondent to recover damages for the death of her husband. When appellant had rested her case, respondent moved for a nonsuit, which motion was denied. No testimony was introduced on the part of the respondent. The case went to the jury, and a verdict in the sum of $2,500 was rendered. The clerk made the following entry in the minute book of the court:

"We, the jury in the above entitled cause, do find for the plaintiff in the sum of two thousand five hundred dollars ($2,500). Charles D. Taylor, Foreman.

"Upon the reading of the verdict and before the filing of the same, the defendant by its counsel moved the court to set aside the verdict and grant judgment for the defendant notwithstanding the verdict. Whereupon the verdict was filed and judgment is hereby entered thereon."

Thereafter the motion for *judgment non obstante* was noticed for a hearing. The court, after reciting the trial and the rendition of the verdict and the motion for judgment notwithstanding the verdict, made the following recital which is entered in the journals of the court:

"The court having ordered that the entry of the judgment be held in abeyance until the court's decision upon said motion; and said motion of the defendant for judgment notwithstanding the verdict having come regularly on for hearing on April 5, 1915, and both parties being represented by their respective counsel, and arguments of the respective counsel having been heard, and the court being fully advised in the premises;

"Now, therefore, it is hereby ordered, adjudged and decreed that the verdict of the jury entered herein on March 18, 1915, be, and the same is, hereby set aside and held for naught, and it is ordered and adjudged that the plaintiff take nothing by reason of her complaint herein and that the above entitled action be, and the same is, hereby dismissed."

Appellant contends that the entry in the minute book was an entry of judgment. A motion for judgment *non obstante* having been made, the entry in the minute book was not a

judgment. *Mattson v. Griffin Transfer Co.*, *ante* p. 1, 155 Pac. 892. Where the minutes show that a motion *non obstante* was made before a judgment is entered, and they do not show that it was passed upon by the court, we will, as held in the *Mattson* case, presume that the court held its ruling in abeyance pending a formal ruling. This must be so where the court notes the informality of the record by a later and formal order. A similar state of the record was before us in the case of *Beck v. International Harvester Co. of America*, 85 Wash. 413, 148 Pac. 35.

Upon the merits of the case, it seems to have been the opinion of the trial judge that there was no testimony to sustain the verdict. The husband of the appellant was a passenger upon one of the street cars operated by the respondent. The car was a pay-as-you-enter car, having gates which were opened and closed by the employees of the company, and through which passengers could not pass unless they were so opened. The deceased was seen on the rear platform of the car by two witnesses who were driving behind the car in an automobile. The lights of the automobile were lit so as to give a plain view of the street in front of the automobile and of the rear platform of the car. The car stopped and, in obedience to an ordinance of the city, the automobile was stopped while passengers alighted. When the deceased was next observed by the witnesses he was lying in the street about fifteen feet in the rear of the street car. The conductor was seen to reach up and ring the bell. One of the witnesses and the conductor went to the deceased and picked him up. He had suffered injuries from which he subsequently died.

We take it from the argument of respondent that the trial judge was of opinion that the verdict could not be sustained unless it was made to rest upon the ground of *res ipsa loquitur*. Many cases are cited to sustain the proposition that the simple fact that a passenger falls while alighting from a train raises no presumption of negligence on the

part of the carrier. But we think the case does not fall within the rule of *res ipsa loquitur.*

We think the proofs were sufficient to sustain the verdict. The movement of a passenger when alighting from the car was entirely within the control of the respondent's conductor and motorman. As we said in the case of *Ferrell v. Washington Water Power Co.*, 83 Wash. 319, 145 Pac. 442:

"It is a matter of common knowledge that transportation companies are adopting cars of the pay-as-you-enter type, having gates under the control of the motorman or conductor. . . . The books are full of cases where passengers have claimed injuries in consequence of a sudden starting or stopping or jerking or lurching of the car just as they were about to get off or get on. One of the principal objects sought to be accomplished by the use of such cars is to overcome the uncertainty of oral testimony, by the use of a mechanical appliance."

The fact that the deceased could not step off the car until the gate was opened; that it was the duty of the conductor to hold the car until he had stepped safely onto the street below; the fact that he fell with such violence as to bring about a fatal result; the fact that the conductor rang the bell; and the fact that the car was fifteen feet away from the deceased, make it most probable that the deceased did not fall in consequence of any negligence on his part. The proved facts and circumstances indicate rather that, before he had gained a place of safety, the car was started with such violence as to throw him to the ground. We have not overlooked the fact that the witnesses do not testify in terms that the car had started. Neither do they say that it had not. But this, like any other fact, may be proved by circumstantial evidence. When all of the circumstances taken together show a state of facts from which the inference of negligence is reasonably probable, it is the duty of the one charged to explain them away. Otherwise it will be held that the plaintiff has made a *prima facie* case upon which judgment may be entered.

Counsel contend that the deceased may have been injured in many ways. They say:

"Frescoln may have slipped upon the steps; he may have tripped over his well-loaded shopping bag; he may have become entangled in his long ulster; he may have been overcome by a sudden spell of dizziness; the heel of his shoe may have come off. It is not impossible that he may have lost his footing by reason of carelessly misjudging the steps, or by reason of some other negligent act on his part."

Without reviewing the many decisions of this court and other cases cited by counsel in which it has been held that a verdict will not be permitted to rest upon speculation and conjecture, and without receding in any way from the rule as therein announced, it is enough that they have no possible application where the happening of the accident is described by testimony independent of the mere happening of the event. A reasonable probability, sufficient to put one charged with negligence to proof, may be shown by circumstances.

Speculation and conjecture, when used in this connection, mean the same thing. The cause of an accident may be said to be speculative when, from a consideration of all the facts, it is as likely that it happened from one cause as another. As soon as the balance of possibilities is broken, the jury is put to the burden of weighing the evidence. So in the case at bar, the control of the gate and of the movement of passengers; the fact that the design of the car was to prevent just such accidents as was suffered by the deceased; the fact that the car was fifteen feet away when the conductor pulled the bell rope, are sufficient to overcome the possibility that the deceased would have fallen because of the bundles that he carried, or on account of other conditions suggested by counsel, and to put respondent to its proofs.

The cases relied upon by counsel are collected in *Weckter v. Great Northern R. Co.*, 54 Wash. 203, 102 Pac. 1053. This case falls rather within the rule announced in *Helland v. Bridenstine*, 55 Wash. 470, 104 Pac. 626, where the court,

after saying that the plaintiff was not required to prove her case beyond a reasonable doubt, held that "it was only necessary that she show a chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable." In *Ohrstrom v. Tacoma*, 57 Wash. 121, 106 Pac. 629, a case depending upon established circumstances was distinguished from the cases depending upon speculation. In *Graaf v. Vulcan Iron Works*, 59 Wash. 325, 109 Pac. 1016, the same contention was made. The court said:

"The answer to this contention is that the jury has, upon the evidence submitted, weighed the probabilities, exonerated the servant, and found the master guilty of negligence. As we have seen, the respondent offered no testimony. Surely it cannot be said that reasonable minds may not differ as to whether the appellant was negligent."

In *St. Germain v. Potlatch Lumber Co.*, 76 Wash. 102, 135 Pac. 804, St. Germain was riding upon the pilot of a switch engine. No one saw the accident. St. Germain was discovered underneath the pilot. Some circumstances were testified to tending to show a reasonable probability of negligence on the part of defendant. It was there complained that the cause of the accident was speculative and conjectural. The court held the circumstances tending to show a soft roadway, and loose mortise joints in the pilot of the engine, sufficient to carry the case to the jury. The court said:

"A plaintiff in this character of case is not obligated to establish the material facts essential to a recovery beyond a reasonable doubt. Such a rule would amount to a denial of justice. It is sufficient if his evidence affords room for men of reasonable minds to conclude that there is a greater probability that the accident causing the injury happened in such a way as to fix liability upon the person charged with such liability, than it is that it happened in a way for which the person so charged would not be liable. 'There are very few things in human affairs, and especially in litigation involving

damages, that can be established to such absolute certainty as to exclude the possibility, or even some probability, that another cause or reason may have been the true cause or reason for the damage, rather than the one alleged by the plaintiff. But such possibility, or even probability, is not to be allowed to defeat the right of recovery, where the plaintiff has presented to the jury sufficient facts and circumstances surrounding the occurrence as to justify a reasonable juror in concluding that the thing charged was the prime and moving cause.' In other words, the plaintiff is only required to satisfy the jury, by a fair preponderance of the evidence, that the accident causing the death occurred in the manner he contends it did. We think the evidence here justified such a finding, and that there is no cause for sustaining a challenge to the sufficiency of the evidence."

In *Sweeten v. Pacific Power & Light Co.*, 88 Wash. 679, 153 Pac. 1054, we held:

"The cause of an accident, like any other fact, may be proven by circumstantial evidence. Here a sufficient cause of the accident was shown, coupled with circumstances strongly indicating that it was the real cause. The accident was sufficiently accounted for as resulting from contact with the uninsulated wire. It was not incumbent upon respondent to negative every other possible cause. Proof of the exposed condition of the wire, its contact with the tree, the custom of the children to climb the tree at this period of the year, and the finding of the boy at the foot of the tree bearing upon his body fresh electrical burns, made a *prima facie* case which could only be overcome by proof that the death of the child resulted from some other cause. The respondent was not required to prove the cause of the accident beyond a reasonable doubt, but only by a preponderance of the evidence. It is true, as we have often held, a verdict may not rest upon pure speculation, but the correlative is also true that a verdict resting upon competent evidence may not be set aside upon pure speculation. *Dumas v. Walville Lumber Co.*, 64 Wash. 381, 116 Pac. 1091; *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 68 Pac. 896, 92 Am. St. 847, 58 L. R. A. 313; *Abrams v. Seattle & Montana R. Co.*, 27 Wash. 507, 68 Pac. 78."

See, also, Thompson, Negligence, § 7863.

The cases principally relied upon by counsel for respondent, other than certain of our own cases, are *Armstrong v. Metropolitan St. R. Co.*, 23 App. Div. 137, 48 N. Y. Supp. 597, and *Paynter v. Bridgeton & M. Traction Co.*, 67 N. J. L. 619, 52 Atl. 367. These cases do not deny but rather affirm our holding. In the first case, the court measured the probabilities and found that the probability of fault on the part of the plaintiff was as great as that on the part of the defendant. "There was positive evidence to the contrary." In the last case, the only thing proved was the fall. "Nothing was proved causing the fall, or any circumstances which could be in any way said to show that the defendant was negligent."

Counsel urge also that the deceased was seen to fall headlong from the car; that if he had been thrown from the car by reason of its starting before he had stepped onto the ground he would have fallen behind rather than away from the car. Meeting the same contention in the case of *Blau v. Puget Sound Traction, Light & Power Co.*, 88 Wash. 260, 152 Pac. 1023, we held that it was for the jury and not for the court to say whether the accident was physically impossible.

We think the case falls within this principle, and the judgment is reversed with instructions to the lower court to enter a judgment upon the verdict.

MORRIS, C. J., FULLERTON, and ELLIS, JJ., concur.

[No. 13212. Department Two. February 29, 1916.]

KLOCK PRODUCE COMPANY, *Appellant*, v. DIAMOND ICE & STORAGE COMPANY, *Respondent*.[1]

WAREHOUSEMEN—RECEIPTS—"NEGOTIABLE" FORM. Warehousemen being permitted by 3 Rem. & Bal. Code, § 3369-1 to make receipts either negotiable or nonnegotiable, a receipt not in the form prescribed, but stamped "negotiable" and so issued, is properly deemed negotiable.

SAME—LIEN FOR OTHER GOODS—NEGOTIABLE RECEIPTS—SURCHARGE. Under 3 Rem. & Bal. Code, § 3369-30, providing that, if a warehouseman issues a negotiable receipt, the goods shall not be subject to liens except for subsequent storage charges of those goods, unless the receipt expressly enumerates other charges for which a lien is claimed, such a receipt cannot subsequently be surcharged with liens for other goods not mentioned, upon making a partial withdrawal, by virtue of Id., § 3369-28, providing for such a lien for charges on other goods belonging to the same depositor "wherever deposited," since the later section is expressly made "subject to the provisions of § 3369-30."

SAME—NEGOTIABLE RECEIPTS—LIEN ON OTHER GOODS—SURCHARGE ON PARTIAL WITHDRAWAL. On the partial withdrawal of goods from a warehouse, held on a negotiable receipt, which, under 3 Rem. & Bal. Code, § 3369-30, cannot be surcharged for other liens not expressly enumerated in the receipt, the warehouseman cannot, against the consent of the holder, alter the old receipt by indorsing thereon a claim of lien for storage of other goods not originally enumerated; and Id., § 3369-12, making a warehouseman liable to transferees of a negotiable receipt upon partial withdrawal of the goods, if they fail to take up or cancel the receipt or indorse a statement of the withdrawals, does not authorize the warehouse to force an exchange of receipts against the consent of the holder or surcharge a negotiable receipt with other liens.

SAME—NEGOTIABLE RECEIPTS—LIEN ON OTHER GOODS—SURCHARGING AS BETWEEN PARTIES. Rem. & Bal. Code, § 3369-30, providing that, where a warehouseman issues a negotiable receipt, the goods shall not be subject to liens except for subsequent storage charges of those goods, unless the receipt expressly enumerates other charges for which a lien is claimed, was not intended simply for the protection of transferees and third parties, but forbids belated surcharging of a negotiable receipt as between the original parties to the receipt;

[1]Reported in 155 Pac. 414.

the policy of the law being to make negotiable receipts useful in the highest degree and the warehousemen being fully protected by liens on the stored goods (MOUNT, J., dissenting).

PLEADING—AMENDMENT—TRIAL AMENDMENTS—COUNTERCLAIM. In an action by a depositor of goods against a warehouseman for conversion in refusing to deliver until a wrongfully surcharged lien on other goods was paid, in which the defendant interposed no counterclaim or set-off, it is error, after close of the case, to allow the defendant to amend by claiming equitable relief by way of foreclosure of his lien on the other goods and sale of the goods in suit thereunder.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered October 19, 1915, upon findings in favor of the defendant, in an action for conversion, tried to the court. Reversed.

Frank S. Griffith, for appellant.

James B. Howe and *A. J. Falknor*, for respondent.

BAUSMAN, J.—The Klock Company holds defendant's warehouse receipt for cheese. The statute on warehouse receipts (Laws 1913, p. 279; 3 Rem. & Bal. Code, § 3369-1 *et seq.*) permits the warehouseman to make them either negotiable or nonnegotiable and prescribes for the former a definition. While this receipt does not conform to that definition, it was specially stamped "Negotiable," was so issued, and was properly deemed negotiable by the lower court.

After getting the receipt, plaintiff, from time to time, withdrew quantities which were regularly indorsed. On one such occasion, however, the warehouseman also indorsed "subject to warehouseman's lien for storage charges amounting to $534.83." Now this sum was not due upon the cheese, but upon eggs also stored by plaintiff which the court found had been previously withdrawn. To this surcharge plaintiff objected, tendering this receipt, paying what was due on the cheese and demanding delivery. The defendant, however, refused delivery of the cheese because the other charges were

not paid, and in this suit by plaintiff in damages for conversion, tried without a jury, was sustained by the lower court.

Had defendant a right thus to surcharge a negotiable receipt? He points to §§ 27 and 28 of the act (Laws 1913, p. 287; 3 Rem. & Bal. Code, §§ 3369-27, 3369-28). The first gives a lien on the particular goods, the second upon those goods also for charges on others belonging to the same depositor "whenever deposited." Both sections, though, announce the lien as "subject to the provisions of § 30," and this last section, which we italicize in part, reads as follows:

"If a *negotiable* receipt is issued for goods, the warehouseman shall have no lien thereon, except for charges for storage *of those goods* subsequent to the date of the receipt, *unless the receipt expressly enumerates other charges for which a lien is claimed.* In such case there shall be a lien for the charges enumerated so far as they are within the terms of section 27, although the amount of the charges so enumerated is not stated in the receipt." 3 Rem. & Bal. Code, § 3369-30.

The extent of a lien under a negotiable receipt is thus apparently clear. That kind of receipt may indeed carry a lien for other goods also, but, as distinguished from a nonnegotiable receipt, it must say so at the outset.

But, the warehouseman argues, the language "whenever deposited" in § 28 qualifies the provisions of § 30 and the two should be read together. This argument we reject. Neither policy nor natural construction supports that qualification. The words "whenever deposited" have their application against nonnegotiable receipts, but not against negotiable. That is the reason why this § 28 expressly subjects itself to § 30 and not to the sections describing nonnegotiable receipts. So much on the very face of the statute. Now as to its policy. Shall the depositor of a carload of fruit be unable to withdraw a few crates without suffering on the prior negotiable receipt entire surcharge for storage of a thousand barrels of cement of his deposited after that receipt, freely accepted by the warehouseman in the probability that the negotiable fruit receipt would be by as-

signment placed beyond surcharge, still in the warehouse, and themselves bound by this very statute for their own lien? This burdensome and yet logical conclusion from respondent's argument is wholly unnecessary to the warehouseman's protection, for he already has his lien on the cement. We cannot favor the theory of retroactive surcharge. As to negotiable receipts, *previous* charges on other goods may be noted, and they must be noted or they are lost. *Future* charges for subsequent goods are beyond noting in it at all. These two things are plain from both language and policy.

Nor do we overlook § 12 (Id., § 3369-12), which provides that, "where a warehouseman delivers part of the goods for which he had issued a negotiable receipt and fails either to take up and cancel such receipt or to place plainly upon it a statement" of withdrawals, he shall be liable to transferees. We do not agree with respondent, who apparently concludes that this language permits two things, first, that the warehouseman may, on a partial withdrawal, force an exchange of receipts *against the consent of the holder*, and that the statute was not in that language contemplating such exchanges as might occur out of mere convenience by consent; second, that in any such exchange, the warehouseman may issue the new receipt surcharged for other goods when the original was not surcharged. To neither conclusion can we now assent, nor is it necessary now to discuss an argument which might equally give the warehouseman a right to substitute then a nonnegotiable for a previous negotiable receipt; for, should we concede a privilege in that section, we do not see its limits.

These things may be considered when we have before us the issuing of a new receipt in exchange, not here. For what this warehouseman has done on the partial withdrawal is to alter the old receipt, and that, in our opinion, is not the same as issuing a new one. He chose, for reasons of his own, not to offer a new, but to alter the old contract, which

expressly gave the depositor, as we construed § 30, a right to have the cheese back on payment of what should accrue against that alone. We may add that whether the charges on the eggs arose before the receipt was issued for the cheese, or between its date and that of the surcharge, is not clear in this record, but that date is unimportant, since we have to do with a negotiable receipt.

Finally, it is argued that, granting that § 30 forbids belated surcharging of a negotiable receipt, the statute really was looking to the protection of third parties, and that in this suit between original parties the court should give the warehouseman this surcharge. Such doctrines, often tempting to courts, generally lead, though, to embarrassment. If we should let the rule vary in this way we should justify endless contentions as to whether a receipt alleged to be transferred was transferred in good faith, whether the assignment was in legal form, whether the warehouseman had actual notice of it when it was not in legal form, whether the transfer was for value, together with many other contentions that would frequently expose true transferees to loss on technical grounds or put them to laborious proofs which, if we let this statute speak for itself, the paper in his hands would spare him.

The statute itself is simple. It will work no hardship on the warehouseman or anybody if let alone. Consider it as it now stands from the warehouseman's point of view. If he holds accrued charges on other goods, he can avoid just such controversies as this by stamping upon the receipt when he issues it those previous charges. On the other hand, if he has already issued the negotiable receipt and additional goods are deposited, he need not meddle with the previous receipt, for he has his lien on those later deposits.

The policy of this law was to make negotiable receipts useful in the highest degree. No matter whether the depositor has yet transferred it or not, he has reckoned that bailment free for future uses. He must frequently employ

the receipt as collateral under mere equitable assignment and pledge for value without indorsement or delivery, and it frequently promotes the convenience, both of the borrower and of the lender, that it be intrusted back to his hands for partial withdrawal of goods while still held as collateral. The warehouseman having already a lien on other goods, we see no reason for relaxing the section as to negotiable receipts to read into it what is not in it, and to say that, after all, it means something else when the controversy is between the warehouseman and the original party.

We have here a plain contract to deliver these goods "on payment of charges," and no other charges being mentioned, we construe it to be a contract to surrender it on payment of what should accrue against that deposit only. With the special stamp of negotiability then put on it, it was a negotiable receipt, without other charges to be imposed than those named. The warehouseman cannot alter that contract against the consent of the holder.

No counterclaim or set-off was interposed here. All that defendant set up was that he had a right to retain the cheese under his lien. He asked only that plaintiff's suit be dismissed. But when both parties had rested, defendant moved to amend his answer "so as to ask for equitable relief and that his lien be foreclosed and the cheese sold under it." This the court allowed. It gave him what he asked, but the record does not show that the court gave more than was asked. We cannot now, over plaintiff's objection, allow, as a substitute for the lien to which he was not entitled, a counterclaim or set-off never pleaded and never prayed for.

The judgment is reversed, with instructions to enter one in favor of plaintiff for $812.92, with interest from April 23, 1915.

MORRIS, C. J., PARKER, and HOLCOMB, JJ., concur.

MOUNT, J. (dissenting)—If this warehouse receipt had been negotiated, and presented by some person other than

the original depositor of the goods, I could readily agree that the warehouseman would have no right to surcharge the receipt for storage of other goods by the original depositor. The receipt in this case was not negotiated; or if it had been negotiated, came back regularly into the possession of the original depositor, who presented the receipt to the warehouseman and demanded and received a portion of the goods. The surrender of this portion was indorsed upon the receipt. This was the issuance of a new receipt, and under the terms of Laws 1913, p. 288, § 30 (3 Rem. & Bal. Code, § 3369-30), the warehouseman had the right to indorse thereon other charges. No rights of any third person were affected thereby. The warehouseman, at that time, might have canceled the old receipt and issued a new one for the lesser amount of goods. Upon the new receipt he might have enumerated the "other charges for which a lien is claimed." This is apparently conceded by the majority opinion. If the warehouseman may do this, he certainly may make the indorsement upon the original when it is returned by the original depositor for alteration when he takes away a part of the goods originally stored, because the altered receipt in the hands of the original bailor is a new original receipt for the lesser amount of goods. In my opinion, the judgment of the lower court was right, and should be affirmed.

I therefore dissent.

[No. 12758. Department One. March 1, 1916.]

ALFRED FAULKNER, *Respondent*, v. HEDWIG FAULKNER, *Appellant*.[1]

DIVORCE—DECREE—VACATION — FRAUD IN PROCURING — EVIDENCE—SUFFICIENCY. A decree of divorce, granted on default after personal service, should not be vacated for fraud in preventing the wife from appearing and defending, where it merely appears that she might not have fully understood plaintiff's attorney, who did nothing to mislead her, and that plaintiff resided at their common home during the pendency of the action occupying a separate room.

SAME—VACATION—DEFENSES WAIVED. The fact that plaintiff in a divorce case was criminally intimate with another woman during the pendency of the action is not ground for vacating a default judgment, where defendant had knowledge of such intimacy in time to make a defense to the action.

SAME—VACATION—PUBLIC INTEREST—DISCRETION. The vacation of a default judgment of divorce because of public interest, after the right to take an appeal had expired, is a matter of discretion, and no abuse of discretion is shown by a refusal where the plaintiff had lawfully intermarried with a third person.

SAME—VACATION—GROUNDS—ERRONEOUS JUDGMENT. A decree of divorce is not void for failure of the record to show an allegation and finding as to the residence of the plaintiff or any finding of the specific facts upon which the decree rested, but is merely erroneous, and such defects are not ground for vacation of the decree by petition.

Appeal from an order of the superior court for Pierce county, Clifford, J., entered November 12, 1914, upon findings in favor of the plaintiff, denying a petition to vacate a decree of divorce for fraud, tried to the court. Affirmed.

Kelly & MacMahon, for appellant.

Frank H. Kelley, *Ralph Woods*, and *A. H. Garretson*, for respondent.

FULLERTON, J.—On December 31, 1913, the respondent, as plaintiff, instituted an action in the superior court of Pierce county for a divorce against his wife, the present ap-

[1]Reported in 155 Pac. 404.

pellant. In his complaint the respondent alleged residence in the state for more than one year last past, but failed to allege that he resided in the county in which the action was instituted. As grounds for a divorce, he alleged facts tending to show cruel and inhuman treatment and personal indignities towards himself by his wife which rendered his life burdensome. Personal service of the complaint and summons was made on the wife in Pierce county, the county of her residence, but she defaulted in the action and the same was resisted by the prosecuting attorney. The court, after the trial, regularly made findings of fact and conclusions of law, and entered a decree granting the divorce. The findings with respect to the residence of the plaintiff followed the allegations of the complaint, and with reference to the grounds for the divorce, made no finding at all, further than in the conclusion of law it is recited that the "acts and treatment complained of in the complaint has amounted to cruel and inhuman treatment to such an extent as to render life burdensome" to the respondent, and that such treatment entitled him to a divorce as a matter of law. Nor did the decree entered contain any recital as to the residence of the plaintiff or as to the grounds upon which it was rested; it merely recited that it was based upon the findings of fact and conclusions of law theretofore rendered in the cause. The evidence taken at the trial was not preserved in the record; at least, it is not in the record before us.

The decree was entered on February 26, 1914, and on August 28, 1914, some six months and two days thereafter, the appellant filed a petition under the statute for a vacation of the judgment. In the petition it was alleged that the record upon which the decree is based is insufficient to support the decree; that the appellant has a meritorious defense to the action; that she is a German by birth, unfamiliar with court procedure, and was led to make default in the divorce action through deception and fraud practiced upon her by the respondent and his attorney, leading her to be-

lieve, prior to the time leave to answer had expired, that the action had been discontinued.

At the hearing upon the petition, the court tried the allegations of deception and fraud and, finding that none had been practiced upon her by the respondent or any one representing him which prevented her from appearing in and making a defense to the action, refused to inquire into the merits of her defense, and refused to set aside the decree on the grounds of irregularity or insufficiency of the proceedings supporting it. This is an appeal from the order evidencing the ruling.

As to the question of fact tried by the court, we are inclined to agree with its conclusion. The charge against the respondent's attorney has no foundation whatever. The appellant went to his office shortly after the service of process was made upon her. In the interview she told him she wanted no divorce, that the allegations of the complaint setting forth the grounds therefor were false, and that the proposed division of the property of the parties was inequitable. The attorney told her distinctly and emphatically that he was her husband's attorney and could not act for her with reference to the matter of the divorce; that if she desired to defeat the action she must employ an attorney and defend, as default would be taken against her if she did not do so. With reference to the proposed division of the property, he told her that, if she did not wish to defeat a divorce, he would treat with her with reference to it. His testimony is to the effect that this branch of the case was gone over between them somewhat fully, and that he did make a change in the decree from that originally contemplated, favorable to the appellant, as a result of the interview. It may be that the appellant, because of her unfamiliarity with court procedure and the language necessary to convey ideas pertaining thereto, did not fully understand him, but there is no cause to believe that he in any way misled her.

As to the husband, while the proofs are not so clear, we are unable to find that his conduct was such as to induce or prevent her from appearing and defending the action. It is true he resided at the common home of himself and the defendant during the pendency of the action, but since he occupied a separate room in the house, apart from the defendant, this would not have been sufficient grounds on which to defeat the divorce action, and much less is it sufficient ground for the vacation of the decree entered therein. *Denison v. Denison*, 4 Wash. 705, 30 Pac. 1100.

The appellant's counsel, in their brief, assert that the record shows that the respondent cohabited with the appellant during the time the action was pending, and that she was led thereby to believe that the grievances alleged against her had been condoned and the action discontinued, but the record as we read it does not sustain the claim. The appellant details a circumstance from which it might be inferred that the respondent had cohabited with her during the time the divorce action was pending, but in answer to a direct question put to her by the presiding judge, inquiring whether he had done so, she answered in the negative. It is not necessary to argue, of course, that if the premise from which a conclusion is deduced fails of proof, the conclusion must fail also.

But it is claimed that the respondent was criminally intimate with another woman prior to and during the time the divorce action was pending, and that this fact is sufficient to require the vacation of the decree. The evidence which discloses this fact discloses also that the appellant had knowledge of the fact in sufficient time to set it up as a defense to the action and that she failed so to do. Her own negligence, therefore, is sufficient to estop her from having a vacation of the decree as a matter of right, on the principle that one having a valid defense to a divorce action and failing to set it up has no just ground to complain of the decree.

The real question then is, should the court have set the decree aside when the fact appeared because of the public interest. That it has such power may be conceded, and perhaps, if the fact timely appeared, it might be its duty to do so. But when the fact is made to appear after the right of appeal has expired, the court may be confronted with conflicting public interests, and a duty to determine the course which will best promote such interests. In other words, the matter becomes one of discretion with the court, to be reviewed on appeal only when such discretion is abused. We fail to find that it has been abused in this instance. This petition was filed after the expiration of six months from the date of the entry of the decree, and no appeal had been taken therefrom. The plaintiff had the lawful right to intermarry with a third person after that period, and the court found that he did so intermarry. While the respondent himself may be entitled to no consideration because of the fact, the new wife may be so entitled, and the possible offspring of the marriage, in that they may not come as bastards into the world, are clearly so entitled. The court was confronted with the duty of either allowing a fraudulent decree to stand or of doing a possible injustice to the innocent, and having exercised its discretion, its ruling ought not to be disturbed.

The appellant further contends that the decree is void and should be set aside because of the defects appearing on the face of the record. These consist, as we have noted, of a want of an allegation and finding that the plaintiff was a resident of the county of Pierce at the time of the commencement of the action, and a want of the finding of the specific facts upon which the decree was rested. But while these omissions from the record would have been sufficient to warrant the reversal of the decree on an appeal therefrom (*Ramsdell v. Ramsdell*, 47 Wash. 444, 92 Pac. 278), they are not sufficient to require its vacation by petition after the time for an appeal has expired. The decree is voidable only, not void, and vacation by petition is a remedy applicable only

to extraneous matters, not to set aside a judgment because merely erroneous as a matter of law. *Morgan v. Williams*, 77 Wash. 343, 137 Pac. 476; *Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182; *Dickson v. Matheson*, 12 Wash. 196, 40 Pac. 725; *Tacoma Lumber & Mfg. Co. v. Wolff*, 7 Wash. 478, 35 Pac. 115, 755.

As we said in the first case cited:

"To hold that the trial court should have entertained this motion and vacated this judgment would be, in effect, to permit the trial court to entertain upon motion an appeal from its own judgment, review the law of the case and reverse itself for error of law. The statute under which the motion was made was never intended to have that effect.

" 'The power to vacate judgments, on motion, is confined to cases in which the ground alleged is something extraneous to the action of the court or goes only to the question of the regularity of its proceedings. It is not intended to be used as a means for the court to review or revise its own final judgments, or to correct any errors of law into which it may have fallen. That a judgment is erroneous as a matter of law is ground for an appeal, writ of error, or certiorari, according to the case, but it is no ground for setting aside the judgment on motion.' 1 Black, Judgments (2d ed.), § 329."

Our conclusion is that the order appealed from should be affirmed, and it is so ordered.

MORRIS, C. J., MOUNT, CHADWICK, and ELLIS, JJ., concur.

[Nos. 13295, 13297. Department One. March 1, 1916.]

THE STATE OF WASHINGTON, *on the Relation of Ethel Clark, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Kenneth Mackintosh, Judge, Respondent.*

THE STATE OF WASHINGTON, *on the Relation of David A. Clark, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Kenneth Mackintosh, Judge, Respondent.*[1]

DIVORCE—DECREE—CUSTODY OF CHILD—ENFORCEMENT PENDING APPEAL. Where, by a decree of divorce, the custody of a child had been awarded to two different persons for alternate periods of six months, so that no question of the welfare of the child could be involved, the supreme court will not, by mandamus, compel the lower court to enforce its order, pending appeal, which it had declined to do on the ground of want of jurisdiction; since the supreme court, if it has jurisdiction, may treat the refusal of the lower court as a determination that the welfare of the child is not jeopardized by its remaining where it is.

SAME—SUIT MONEY PENDING APPEAL—JURISDICTION. The superior court retains jurisdiction, after judgment in divorce actions, for the purpose of allowing suit money and attorney's fees pending appeal to the supreme court, and the supreme court will not entertain applications therefor.

SAME. The superior court does not lose jurisdiction to allow suit money and attorney's fees pending an appeal from a judgment of divorce by reason of the fact that the decree disposes of the property rights of the parties.

Applications filed in the supreme court January 19 and 20, for a writ of mandamus to compel the enforcement of a decree, and for a writ of prohibition to prevent the hearing of an application for suit money and attorney's fees pending an appeal in divorce proceedings. Denied.

Milo A. Root, for relator Ethel Clark.

H. E. Foster, for relator David A. Clark.

[1]Reported in 155 Pac. 398.

CHADWICK, J.—On the 15th day of December, 1915, in a case wherein Ethel Clark was plaintiff and David A. Clark was defendant, the respondent, as superior judge, made and entered an order, *inter alia*, that Margaret Clark, a minor child of the parties litigant, should be, on the 15th day of January, 1916, or as soon thereafter as called for, surrendered by the sister of defendant, in whose possession the child was, to the parents of Ethel Clark; the decree of the court being that the child should be kept for the first six months by the parents of the plaintiff, and at the expiration of the six months the child should be again delivered over to the sister of the defendant; the custody of the child to thereafter alternate between the parents of the plaintiff and the sister of the defendant. The defendant in the divorce proceeding appealed to this court and gave a supersedeas bond in the sum of $600.

The child was not delivered on the first day of January, 1916, nor when called for. The relator Ethel Clark then made application to the respondent for an order directing the defendant to comply with that part of the decree which directed that the child should be placed in the custody of her parents. Respondent, upon the objection of counsel for defendant, refused to hear and consider, or determine the motion, for the reason, as stated in the petition for the writ, that he had no jurisdiction to hear or determine the motion. Relator thereupon applied to this court for a writ of mandamus to compel the respondent to execute its decree in so far as it pertains to the care and custody of the child. The relator relies upon the case of *State ex rel. Davenport v. Poindexter*, 45 Wash. 87, 87 Pac. 1069, wherein it is said:

"In such a proceeding as this, we do not think the giving of a supersedeas bond has any effect whatever upon the possession, custody and control of the minor children in question. It being presumed that the order of the trial judge was correct, and that he was actuated by a consideration

for the minors' welfare, it would be against public policy to have that welfare imperiled during an appeal, in the absence of a statute clearly permitting the staying of such orders. The trial court had jurisdiction to take said children into its possession, if it believed that their physical or moral welfare or other substantial interests necessitated such action. When the appeal was perfected, this court became invested with jurisdiction to make such orders as the welfare and necessities of said minors might demand. If, as contended by relator, the present situation of these minors is so unsuitable as to menace their physical or moral welfare or other substantial interests, the question of an appropriate change could doubtless be considered by this court upon a proper showing. *Irving v. Irving*, 26 Wash. 122, 66 Pac. 123. But such a matter is not before us at this time. Relators are basing their right to the immediate possession of said children upon the supersedeas bond given as aforesaid. The giving of such bond does not entitle them to such possession. The application for the writ is denied."

It may be admitted that the language there used by the court is broad enough to cover the case at bar, but we are not inclined to extend its holding to a state of facts that do not come within the facts of that case. There the relators had brought a habeas corpus proceeding and had appealed from an adverse judgment. They gave a supersedeas bond. The record in that case, as it came to this court, disclosed no more than that the trial judge had found that the relators had no legal right to the care, control, and custody of the child, and further, that the mother was a fit and proper person to have such care and custody. The parties relied entirely upon the supersedeas bond. In that case the court held that, "the welfare of the children is a matter of prime importance and public concern, and must be the subject of careful consideration at all stages of any proceeding wherein their possession, custody or control is involved."

In the case at bar, an appeal is pending. The child is in the possession of the sister of defendant, who has been found

to be worthy. Whether the respondent had jurisdiction to execute his decree by ordering the child turned over to the parents of the relator is of little consequence; for granting, as the relator admits, that the jurisdiction to make any order for the protection and welfare of the child is in this court, and having jurisdiction in virtue of the petition of the relator, we shall, in the exercise of that jurisdiction, treat the refusal of the respondent as a finding that the welfare of the child will not be jeopardized by allowing it to remain where it is pending the appeal. The custody of the child being given to the parents of relator, and to the sister of defendant for equal and alternating periods, neither party can claim that the particular time in which they shall have such custody is of legal consequence. It does not go to the welfare of the child, and that is the only thing this court or the superior court will inquire into.

This holding makes it unnecessary for us to inquire whether the judgment of the court was self-executing in so far as it relates to the child, but it may be understood that that question is not foreclosed by our holding; for it may be that an appellant in a divorce proceeding might supersede the judgment, subject, however, to any further order that might be made by the trial judge pending a final hearing, for this is not a court of first instance. This court tries a case upon the record taken in the court below. In all actions arising under the marriage and divorce statutes, there is much room to argue that the immediate welfare and comfort of children, as well as the protection and conservation of the property, is still within the keeping of the superior judge. He is in position to call witnesses, to hear testimony, and make orders; his discretion and judgment being, of course, subject to review by the appellate court.

For the first reason assigned, therefore, we hold—the character and capacity of the sister of the defendant being in no way challenged—that the welfare of the child does not de-

mand any change in its place of keeping, pending appeal, and the application for the writ is denied.

After the appeal had been perfected in the divorce suit, the plaintiff, Ethel Clark, applied to the court below for an allowance in the way of suit money and attorney's fees. The respondent signifying his willingness to hear and determine her application, the defendant came to this court asking for a writ of prohibition. He contends that the superior court is without jurisdiction, and that the application, if any, must be made in this court. After much controversy of opinion among the judges of this court, it was finally determined in *Griffith v. Griffith*, 71 Wash. 56, 127 Pac. 585, 128 Pac. 686, which holding was reaffirmed in *Lewis v. Lewis*, 83 Wash. 671, 145 Pac. 980, that the superior court had jurisdiction to hear and determine such applications. We are invited to reconsider our holdings, and to distinguish them from the case at bar. We think the case falls squarely within our latest holdings, with which we are satisfied, and the writ will be denied.

In passing, it is not out of place to meet the suggestion that the jurisdiction of the respondent is lost because he has heretofore made decree disposing of the property belonging to the parties to the divorce proceeding; that his decree is a finality; and that, pending the appeal, neither of the parties can have any claim to the property, or support, or maintenance therefrom. Defendant, relator, will lose none of his legal rights if an order is made. In *Griffith v. Griffith*, *supra*, we held—and our holding in this respect was not overruled upon rehearing—that all sums paid in the way of alimony or suit money pending appeal may be considered in the final disposition of the case, saying:

"In this and all other cases, in the absence of a controlling equity, such allowances will be charged to the wife in the division of the property in case a divorce is granted."

The petitions are severally denied.

ELLIS, MOUNT, MAIN, and FULLERTON, JJ., concur.

[No. 12700. *En Banc.* March 1, 1916.]

CHARLES B. WOOD, *Appellant*, v. STAR PUBLISHING COMPANY, *Respondent*.[1]

LIBEL AND SLANDER—LIBEL PER SE—CHARGE OF CRIME—"BRIBERY"—SUFFICIENCY. A newspaper article headed "Bribery" and charging that one K. was offered a bribe in an appointment to a political job, that the offer was made at a certain office to which K. had been invited by plaintiff and that plaintiff was "one of the men present," the article inviting a prosecution for bribery by the prosecuting attorney, is not libelous *per se* as charging a crime and does not charge plaintiff with committing bribery.

SAME—LIBEL PER SE—PUBLIC HATRED AND CONTEMPT. Neither is such charge libelous *per se* as holding the plaintiff up to public hatred, contempt or ridicule, where, read twice, it merely leaves the impression that information could be obtained from plaintiff upon which to found a prosecution for bribery.

SAME—PLEADING—COMPLAINT—SUFFICIENCY—SPECIAL DAMAGES. A complaint for libel by an article not libelous *per se*, in which no special damages are alleged, is demurrable.

MAIN, MOUNT, and CHADWICK, JJ., dissent.

Appeal from a judgment of the superior court for King county, Ronald, J., entered November 30, 1914, upon sustaining a demurrer to the complaint, dismissing an action for libel. Affirmed.

Ballinger, Battle, Hulbert & Shorts, for appellant.

John H. Perry, for respondent.

BAUSMAN, J.—The lower court sustained defendant's demurrer to the amended complaint of Wood, who alleges that defendant, in 1914, published in its "Star" an article both false and malicious, as follows:

"BRIBERY"

"It's a short and ugly word. Its meaning is plain. And it is bribery which the anti-recall gang is employing to get withdrawal of signatures from the Hamilton recall petition. The

[1]Reported in 155 Pac. 400.

Star has a case for you, Prosecuting Attorney Murphy. It's a case of bribery. William Knox, 312 First Ave. S., was offered a bribe last Saturday in the offices of the King county republican central committee, 402 Oriental building. One of the men present at the time, Charles B. Wood, invited Knox there by written letter. Knox was offered the bribe of a political job—the job of being named by Hamilton and Knudsen as a member of the election board in precinct 214 on primary day. Knox held the same position before. He was told he would get it again if he withdrew his signature from the Hamilton recall. Knox refused to be bribed.

"A few days ago, Deputy Prosecutor Ellis announced he would vigorously prosecute all fraud connected with the recall. Here is something worse, Ellis. Here is bribery. What are you going to do about it, Messrs. Murphy and Ellis?"

Not only is Wood not named as the person who offered a bribe, but it is no fair inference that the publisher meant as much. Indeed, plaintiff's counsel, conceding a doubt, sums up his case as follows:

"The reader may be confused as to just who it is that should be prosecuted, but he is impressed with the fact that the publisher of the article knows at least one man who was present at the meeting where the bribe was offered, and that that man was Charles B. Wood, and that he had invited Knox, the man to whom the bribe was offered, to the meeting."

Nor is bribery charged against anybody, for while the article cries out bribery to begin with, it proceeds to describe the thing that did occur with Knox, which, under our laws, could be no bribery of Knox at all. Rem. & Bal. Code, § 2320 *et seq.* (P. C. 135 § 135). Using the word "bribery" is of no moment when, at the same glance, the reader can see, or should know as law, that there was none. I may call my neighbor a thief, but if, at the same time, I say that he is a thief because he got his property from an ancestor who stole it in his lifetime, I have not charged him with being a thief himself.

It is past dispute in this state that a libelous article must be read as a whole; that it is for the court to say, as a matter

of law, whether the words constitute the charging of a crime and are, or are not, libelous *per se*, and that innuendo cannot reinforce simple words. *Urban v. Helmick*, 15 Wash. 155, 45 Pac. 747; *Velikanje v. Millichamp*, 67 Wash. 138, 120 Pac. 876; *McClure v. Review Pub. Co.*, 38 Wash. 160, 80 Pac. 303; *Denney v. Northwestern Credit Ass'n*, 55 Wash. 331, 104 Pac. 769, 25 L. R. A. (N. S.) 1021.

This case is far weaker than that of plaintiff in the *Velikanje* case, where it was held no libel to say that money was paid plaintiff on forged receipts, but was not also said that it was he who had forged them. The *McClure* case turned ultimately on the question of qualified privilege, but before the court got to that point it distinctly held that the articles in question had not charged plaintiff with committing a crime. Yet plaintiff's provocation in that case was apparently much greater than that of plaintiff here. The article denominated her as "Queen of Burglars," but read as a whole, it did not charge her with a crime.

We hold that the article in this case is not libelous *per se* as charging a crime. But it is contended that it at least holds Wood up to public hatred, contempt, and ridicule, which, under our decisions, would still make it libelous *per se* even though it charged no crime and even though he would not be affected in his calling, which is that of a state employee. This last is what we held in *Wells v. Times Printing Co.*, 77 Wash. 171, 137 Pac. 457.

But in this respect, too, we agree with the lower court. We do not think that this article held Wood up to contempt, hatred, or ridicule. In the *Wells* case, what the plaintiff complained of was his being charged with degrading the American flag, and his being a species of disreputable outcast on that account. Now in this article there is at most only, at first glance, a charging of Wood with the wrongdoing. Read twice, it leaves the impression that Wood was named as a person whom the prosecuting attorney could get information from, by whom would be exposed persons whom he knew to

have been with Knox. The thing charged as occurring in the committee room was no more than an attempt to induce the signer of a recall petition to withdraw his name by promise of support to a trifling political position.

The article not being libelous *per se*, and no special damages being pleaded, the demurrer was properly sustained.

Judgment affirmed.

PARKER and ELLIS, JJ., concur.

HOLCOMB, J. (concurring)—I concur upon the sole ground that the article, considered as a whole, charged Wood with no offense, either directly or by necessary implication.

As to whether the context of the publication charged some one with bribery, it was doubtless the intent of the article so to do, in most emphatic terms, but only failed because Knox, not being a public official, was not a bribable person under our law.

Had any person, however, been directly accused or plainly intended by innuendo of the acts related in the article, I think respondent would most assuredly have been amenable to an action for libel under our statute.

FULLERTON, J.—(concurring)—To use the language of the old books, libelous defamations of character are either actionable *per se* or actionable *per quod*. In the first class of actions, the jury is warranted in awarding the plaintiff substantial damages, even though there be no actual injury, on the mere proof of the publication of the defamatory words; the presumption of the law being that the necessary, natural and proximate consequence of the publication is to injure the defendant. In actions of the second class, the law indulges in no presumptions, and before a recovery can be had in such cases special damages, that is to say, damages arising from an actual injury to the person claimed to have been defamed, must be alleged and proven. This distinction has led the courts to scrutinize with care an alleged libelous publication,

and not to permit the publication to go to the jury as libelous *per se* unless it clearly is so.

Turning to the publication in question, I cannot conclude that it is so clearly libelous as to permit it to go to the jury as matter libelous *per se*. Plainly, to my mind, it does not charge the plaintiff with bribery, or attempted bribery. Nor do I think the charge is necessarily implied from the language used. All that is stated concerning the plaintiff is that he wrote the letter which induced the person attempted to be bribed to visit the central committee mentioned, and that he was present when the bribe was offered. This may be true or it may be false; but, as I say, it is not to charge the plaintiff with the commission of the crime there asserted to have been committed.

I am aware that a publication may be libelous *per se* even though it does not charge the commission, or the attempted commission, of a crime, but that it is sufficient in this respect if its tendency is to expose the person of whom it is published to public hatred, contempt, ridicule or obloquy, or cause him to be shunned or avoided. *Lathrop v. Sundberg*, 55 Wash. 144, 104 Pac. 176, 25 L. R. A. (N. S.) 881. But I cannot think this rule in any way aids the present plaintiff. Here the charge is the commission of a crime, or it is not libelous. There is no language used which tends to expose him to public hatred, contempt, ridicule or obloquy, or cause him to be shunned or avoided, apart from the language thought to charge an attempt to commit the crime of bribery.

Since the complaint does not allege special damages, but is grounded on the theory that the publication is libelous *per se*, I am constrained to agree with the conclusion that it does not state a cause of action.

MORRIS, C. J., concurs with FULLERTON, J.

MAIN, J.—(dissenting)—In my opinion the complaint in this case states a cause of action, and the judgment of the superior court should be reversed. Even though the published

article upon which the complaint is based may not charge the commission of a crime, nevertheless it was libelous *per se* if it tended to disgrace Wood, or deprive him of the benefit of public confidence, or hold him up to public ridicule or contempt, or cause him to be shunned or avoided. *Lathrop v. Sundberg*, 55 Wash. 144, 104 Pac. 176, 25 L. R. A. (N. S.) 381; *Wells v. Times Printing Co.*, 77 Wash. 171, 137 Pac. 457.

In the *Lathrop* case, speaking upon this question, it was said:

"In order to constitute a civil libel *per se*, it is not necessary that the words published should involve an imputation of crime. It is enough that they be of such a nature that the court can presume, as a matter of law, that they will tend to disgrace the party of whom they are published, or hold him up to public ridicule, or contempt, or cause him to be shunned or avoided."

In the *Wells* case, the rule as stated in *Quinn v. Review Publishing Co.*, 55 Wash. 69, 104 Pac. 181, 133 Am. St. 1016, is paraphrased and stated with approval as follows:

"Matter libelous *per se* is defined as any publication which falsely and maliciously tends to bring an individual into public hatred, contempt, or ridicule, or charges an act odious and disgraceful in society, including whatever tends to injure the character of an individual or blacken his reputation, or imputes fraud, dishonesty, or other moral turpitude, or reflects shame, or tends to put him without the pale of social intercourse."

A careful consideration of the article here in question does not leave with me the impression that Wood was named as a person from whom the prosecuting attorney could get information, as stated in the majority opinion; but, on the other hand, does leave the impression that Wood was one of the men connected with the thing which the published article condemned, and which was called to the attention of the prosecuting attorney of the county as a proper case for his consideration. It seems to me that the article comes within the rule of the *Lathrop* and *Wells* cases.

For the reasons stated, I am unable to concur in the majority opinion, and therefore dissent.

MOUNT, J., concurs with MAIN, J.

CHADWICK, J. (dissenting)—Let it be remembered that our statute does not require that a man be charged with the commission of a crime before he can recover as for libel.

"Every malicious publication by writing, printing, picture, effigy, sign or otherwise than by mere speech, which shall tend:

"(1) To expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse; . . ." Rem. & Bal. Code, § 2424 (P. C. 135 § 343).

Section 2320 of the code (P. C. 135 § 135), upon which the majority predicates its opinion, has no more to do with the case at bar then the statute defining larceny.

"BRIBERY"

"It's a short and ugly word. Its meaning is plain . . . The Star has a case for you, Prosecuting Attorney Murphy. It's a case of bribery. William Knox, 312 First Ave. S., was offered a bribe last Saturday in the offices of the King county republican central committee, 402 Oriental building. One of the men present at the time, Charles B. Wood, invited Knox there by written letter. Knox was offered the bribe of a political job. . . . Knox refused to be bribed.

"A few days ago, Deputy Prosecutor Ellis announced he would vigorously prosecute all fraud connected with the recall. Here is something worse, Ellis. Here is bribery. What are you going to do about it, Messrs. Murphy and Ellis?"

It would seem that this article touched Mr. Wood in his reputation, and tended to hold him out to public contempt as one who had been a party to a positive violation of the sanctity of the election laws. In the gradual drift from the technical rules of the common law, the courts have generally come to say that "all words alleged to be libelous should be considered in their natural and obvious sense, unless they be

ambiguous." This court has so held in *Urban v. Helmick*, 15 Wash. 155, 45 Pac. 747; *Denney v. Northwestern Credit Association*, 55 Wash. 331, 104 Pac. 769, 25 L. R. A. (N. S.) 1021. Taking the obvious meaning and intent of the article, Mr. Wood invited Mr. Knox to a certain place, a political headquarters, where he was offered a bribe. If true, Mr. Wood was a party to the act, as much so in law as if he had, by word, made the offer. If it had not been for his interest, Knox would not have been tempted. That such is the meaning and intent of the article, may be quickly demonstrated by putting the question: If Murphy or Ellis had acted upon the *demand* of the respondent, and had instituted proceedings, or if a grand jury had noticed the charge, who would have been summoned and put to the shame of answering the charge? It will not be denied that Mr. Wood would have been put to the burden of clearing the suspicion that had been wilfully cast over his good name. But if, as the majority hold, the charge is not direct, the innuendo of the article is so apparent that no man can mistake its meaning. In *Wilson v. Sun Publishing Co.*, 85 Wash. 503, 148 Pac. 774, the court quoted with approval from *Pratt v. Pioneer-Press Co.*, 35 Minn. 251, 28 N. W. 708:

"Unfortunately, the law of libel has been obscured by a mass of technicalities and subtle refinements."

Assuredly we have lapsed into the fog of technical construction and subtle refinement when we hold that the article is not a charge against Mr. Wood. The utter fallacy of the argument of the majority is demonstrated by the words following:

"Now in this article there is at most only, at first glance, a charging of Wood with the wrongdoing. Read twice, it leaves the impression that Wood was named as a person whom the prosecuting attorney could get information from, by whom would be exposed persons whom he knew to have been with Knox."

Why should we assume that the ordinary reader will read the article "twice," or measure it with the delicate instruments of the law, and, by a process of synthesis, extract the poison that drips from every word of the charge and bury it in the vaults of technicality.

That the word "bribery" should have no mistaken meaning, respondent itself defined it. It says: "It's a short and ugly word. Its meaning is plain." The article is addressed to the one charged with the duty of prosecuting criminals. That no difficulty might be had in making proof, respondent named its witness. Respondent asked the public and the prosecutor to take the word in its "plain" meaning without resort to strained and subtle constructions. It is the legal duty of the judges to see as the general public would see. To attach the word "bribery" to the name of a person has always been held to be libelous *per se*. In truth, no decision, other than this one, has ever been pronounced to the contrary, or if so, it has not been called to our attention. The word *is* a short and ugly word. It means wickedness and corruption. It is not necessary, under our statute, to charge a crime. If it were, I am not so sure that one who wrote a letter to a signer of a recall petition, and was present when a promise of a benefit (the article does not, as the opinion assumes, negative the natural inference that Wood was a party to the promise), would not be guilty under Rem. & Bal. Code, § 4969 (P. C. 167 § 469). Neither are we to read the article as "through a glass, darkly," but as the average man would read it, or, as is said by Lord Tenterden, C. J., in *Harvey v. French*, 1 Cr. & M. 11:

"It is quite clear, from all the modern authorities, that a court must read these words in the sense in which ordinary persons, or in which we ourselves out of court, reading this paragraph, would understand them."

In *Woolnoth v. Meadows*, 5 East. 463, counsel contended, as this court is holding, that:

"The words are certainly abusive; but they do not in themselves *necessarily* point to the particular crime." [Italics mine.]

The contention was quickly met by Lawrence, J. He said:

"The argument then goes too far, when it is contended that the words must be such as must necessarily bear a criminal import, and no other, in order to maintain an action upon them."

Grose, J., said:

"Now a court of justice must read the words in the same sense in which the hearers would at the time they were spoken understand them. When I first read them I had no idea that any serious doubt could be entertained of the sense meant to be conveyed by them, namely, an imputation of . . . crime. I think so still."

It will thus be seen that it is from the impression made by the "first glance," and not when "read twice," that the intent is measured. In the same case Le Blanc, J., said:

"It is not sufficient to shew by argument that the words will admit of some other meaning; but the court must understand them as all mankind would understand them, and we cannot understand them differently in court from what they would do out of court. And it would be impossible for a number of persons indifferently assembled, not to agree in the meaning which has been imputed to these words in the declaration."

In *Peake v. Oldham*, Cowp. 275-278, Lord Mansfield said:

". . . where [words], from their general import, they appear to have been spoken with a view to defame a party, the court ought not to be industrious in putting a construction upon them, different from what they bear in the common acceptation and meaning of them."

These rules have not been departed from in modern times. Mr. Townshend on Slander and Libel, § 133, finds the rule to be as stated by Chief Justice Shaw in *Commonwealth v. Child*, 13 Pick. 198:

"The law cannot be eluded by any of the artful and disguised modes in which men attempt to conceal treasonable or libelious and slanderous meanings and designs."

Newell, in his work on Slander and Libel, lays down the same rule. It is found in all the cases, encyclopedias and text books. It is unnecessary to cite them. They are too great in number, and besides, we ourselves have so held, as is shown by Judge Main.

Neither is the illustration, or the conclusion drawn from the case supposed by the writer of the opinion, "I may call my neighbor a thief, but if at the same time I say that he is a thief because he got his property from an ancestor who stole it in his life time, I have not charged him with being a thief himself," sound in law. It is not only unsound, but has been condemned as a libel where the statute has cured the rule of the common law that something technically criminal must be charged. The word thief imputes crime, and tends to the shame of him to whom it is applied as an epithet. ". . . the tendency of the charge is to bring plaintiff into public hatred, ridicule, or scorn," and is therefore a libel *per se*. 25 Cyc. 284.

The libel is as plain as it was in the *Wells* case. In that case the plaintiff was charged with reviling the flag; in this case, with prostituting our elections. The flag is, in a sense, a sentiment. It stands for purity. Without pure elections, it would mean nothing. Surely an election is as important to the people as the flag. The one is an essential factor in government. The other could be dispensed with, and the government still live. In the *Wells* case, we said:

"Such language requires no innuendo to construe its meaning as intending to bring the individual of whom it is written into public hatred, contempt, and ridicule, expose him to public obloquy, scorn, and shame, and cause him to be shunned and avoided by his fellows." *Wells v. Times Printing Co.*, 77 Wash. 171, 137 Pac. 457.

And of the demand that a criminal charge be instituted:

". . . thus not leaving to inference or presumption that the ordinary effect of the language used in the publications would hold appellant up to public hatred, contempt,

scorn, and shame; but expressly charging that appellant was so regarded to the extent of a public demand that criminal laws be invoked against him."

The complaint states a cause of action and the demurrer should have been overruled.

[No. 13075. Department One. March 2, 1916.]

PUGET SOUND BRIDGE & DREDGING COMPANY, *Respondent*, v. GUARDIAN CASUALTY & GUARANTY COMPANY, *Appellant*, CHARLES S. JOHNS *et al.*, *Defendants*.[1]

PRINCIPAL AND SURETY—ACTION ON BOND—JUDGMENT—ON STIPULATION—PRIMARY LIABILITY FOR LIENS—RIGHTS OF SURETY—POSTPONEMENT OF LIABILITY. In an action upon a subcontractors' bond, where it appeared that the subcontractors and their surety were primarily liable in any event to discharge certain lien claimants whom the subcontractors had failed to pay, and the parties stipulated for present judgment for the amount of the established liens, pending the litigation of collateral issues between the contractor and subcontractors, the surety cannot, after entry of such judgment pursuant to stipulation, complain that the collateral issues between the contractor and subcontractors have not yet been determined or the ultimate liability of its principal fixed, or seek any postponement of its liability on the stipulated judgment until that event has transpired; since the surety's liability for the amount of the liens attached immediately upon breach of the bond, and equity will not permit postponement of the payment of the liens pending the trial of collateral issues, and, furthermore, the surety has its remedy over against the subcontractors given by statute and may avail itself of the benefit of any judgment finally entered.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 7, 1915, upon findings in favor of the plaintiff, in an action for equitable relief, tried to the court and a jury. Affirmed.

Reeves Aylmore, Jr., and *S. H. Kelleran*, for appellant.

John W. Roberts, for respondent.

[1]Reported in 155 Pac. 771.

CHADWICK, J.—Respondent, being a principal contractor upon the new King county courthouse, sublet to the firm of McDonald & Jones, whom we shall designate as defendants. Defendants in turn gave a bond with appellant as surety to respondent for the faithful performance of their contract, and for the payment of "laborers, mechanics and subcontractors and materialmen, and all persons who shall supply such person or persons or subcontractors with provisions and supplies for the carrying on of such work, all just debts, dues and demands incurred in the performance of such work."

Defendants did not meet all the claims falling within the terms of their bond, and within the terms of the bond required by the statute which was given by respondent. Respondent thereupon brought an action making defendants, appellant, and all having claims against the work, parties defendant. It asked the court to ascertain the amount of all claims falling within the terms of the bond, and to also fix the amount of damages claimed by it for breach of contract in certain enumerated particulars. Defendants answering, admitted that claims had been filed with the county auditor for certain claims and indebtedness which had been incurred by them, but denied the breaches of contract and the damages claimed by respondent. They excused the nonpayment of the claims of laborers, materialmen, etc., by alleging that more than $10,000 was due from respondent to defendants in damages resulting by reason of the defaults of respondent. The case went to trial. The issues arising out of the claims for damages and the counterclaims were submitted to a jury, which found generally in favor of the defendants, so that, upon a balance struck upon the claims for damages alone, defendants would be entitled to a judgment against respondent. However the jury found that there was due materialmen, etc., the sum of $7,618.22, which, of course, defendants were primarily liable to pay, and for which the appellant is liable.

The trial court granted a new trial upon the motion of

respondent. The record, other than the judgment roll, is not before us, but, from the recitals of the judgment, it would seem that the parties stipulated that a judgment might be entered in favor of the lien claimants for $7,618.22, and against the defendants and the appellant, and further, that, in the event that defendants did not do so, respondent might pay them, and that judgment should be entered in its favor and against defendants and appellant for the amount so paid. The judgment recites:

"That it was admitted by counsel in open court that the defendants McDonald & Jones and the Guardian Casualty & Guaranty Company were personally liable to the various claimants for such amount as the court should determine and fix the claim of each of said claimants to be, and that when the court had held and determined the amounts due to the respective claimants who had filed and proved their claims in open court, that the same should be considered and deemed to be a legal liability as against the defendants McDonald & Jones and the Guardian Casualty & Guaranty Company, for the amount of such liens and claims as was found due to each of said claimants, and for the aggregate amount found due to said claimants, and that the claims, liens and demands of said claimants should be finally disposed of as to all parties to the action without regard to the issues between McDonald & Jones and the Puget Sound Bridge & Dredging Company."

The court thereupon found the amount due lien claimants to be $7,854.72, and held further:

"It having been stipulated in open court before the hearing began upon the various motions and objections that without regard to what action might be taken by the court upon the various motions and objections, or as to the issues between McDonald & Jones and the Puget Sound Bridge & Dredging Company, and without prejudice in any manner to the rights of the Puget Sound Bridge & Dredging Company or McDonald & Jones or either of them in this proceeding in or any future action taken or proceeding had, that there should be a final determination and disposition as to all parties to the action of and in relation to the various and respective lien claimants and their said claims and demands" etc.

And further:

"That said claimants and each of them have and recover judgment from and against defendants McDonald & Jones and the Guardian Casualty & Guaranty Company for said amounts."

And further, that if defendants and the appellant fail to pay the lien claims, respondent may do so and:

"That upon the payment into the registry of this court by the Puget Sound Bridge & Dredging Company of the said sum of $7,854.72, it shall have and recover of and from the defendant Guardian Casualty & Guaranty Company, a judgment for and in the said sum of $7,854.72 . . .

"That upon the receipt of said sum of money by the clerk of this court, the clerk of this court shall then and there and forthwith enter a judgment in this cause in favor of the Puget Sound Bridge & Dredging Company and against the defendant Guardian Casualty & Guaranty Company, for and in the said sum of $7,854.72."

Appellant now complains that, upon a retrial of the collateral issues between respondent and defendants, it may eventuate that the defendants may be called upon to pay nothing to respondent, or a sum very much less than the amount of the lien claims, and that it cannot be called upon to pay until the liability of its principal is fixed finally and conclusively. Whatever appellant may have contended in the court below, it and the parties litigant could assuredly stipulate the judgment that was entered. The judgment reciting a stipulation, we must presume that it follows the stipulation.

But we take it that it is not so much the form of the judgment, or what was stipulated, that concerns appellant, as it is that a judgment was entered against it at a time when the differences between respondent and defendants are yet undetermined. In advancing this contention, appellants have failed to appreciate that its liability attached immediately upon the breach of the terms of its bond by defendants, and that it was the duty of the chancellor to render a judgment against those primarily liable as soon as the lien claims were established.

Equity will not permit the postponement of these claims pending the admeasurement of damages upon collateral issues between respondent and defendants.

Appellant has suffered no legal hurt. Defendants admit the lien claims, and appellant agreed by its bond to pay them if defendants failed to do so. It has its remedy over against defendants, and can employ the remedies given by statute to avail itself of the benefit of any judgment that may finally be entered against respondent.

The judgment is affirmed.

MORRIS, C. J., MOUNT, ELLIS, and FULLERTON, JJ., concur.

[No. 13191. Department One. March 2, 1916.]

J. M. EVANS, *Respondent*, v. C. F. GOIST *et al.*, *Appellants*.[1]

PLEADING—COMPLAINT—CERTAINTY AND DEFINITENESS. It is not error to refuse to compel a complaint on a building contract to be made more definite and certain by setting out the plans and specifications.

ACTIONS—JOINDER. A complaint in an action to foreclose a mechanics' lien for the balance of the contract price, and also for the reasonable value of extras, not expressly provided for in the contract but contemplated in the plans and specifications, is not demurrable for misjoinder of causes of action on contract and on *quantum meruit;* the action being one on contract and not on *quantum meruit.*

APPEAL—REVIEW—HARMLESS ERROR. Upon a trial *de novo* on appeal, errors in the admission of evidence are immaterial.

MECHANICS' LIENS—FORECLOSURE — CONTRACT — SUBSTANTIAL PERFORMANCE—EVIDENCE—SUFFICIENCY. A mechanics' lien will not be denied for plaintiff's failure to substantially perform his contract, although there were minor imperfections which, in a $2,500 job, were fully compensated for by reducing the claim to the extent of $217, where the evidence indicated an attempt in good faith to perform

[1]Reported in 155 Pac. 780.

the contract and to correct all imperfections pointed out, and the owners observed the character of the work and made no objections thereto at the time.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered April 17, 1915, in favor of the plaintiff, in an action to foreclose a mechanics' lien, tried to the court. Affirmed.

H. W. Lueders, for appellants.

Gordon & Remann and *A. O. Burmeister*, for respondent.

MOUNT, J.—This action was brought to foreclose a mechanics' lien for a balance alleged to be due the plaintiff under a contract to construct a bungalow for the agreed price of $2,425.

The complaint alleged that the work was to be done under a contract, which contract is set forth in full as an exhibit to the complaint. One paragraph of the written contract is as follows:

"The said party of the second part hereby promises and agrees to erect one bungalow as per plans and specifications furnished by party of the first part."

The complaint alleged that the work was completed in accordance with the contract, and in addition to the contract price, that the plaintiff, at the request of the defendant, furnished extra work of the reasonable value of $69.70; that the total sum due upon the contract was $2,494.70; that the plaintiff had been paid thereon the sum of $1,625, leaving a balance of $869.70, for which the plaintiff prayed a foreclosure of the lien.

The defendant filed a motion for an order to make the complaint more definite and certain by setting forth a copy of the plans and specifications; and by stating whether the plaintiff was relying upon his contract or upon a *quantum meruit*. This motion was denied. A demurrer was then filed on the ground that the complaint did not state facts sufficient

to constitute a cause of action; and that two causes of action were improperly united, one an action upon contract, and the other an action upon *quantum meruit*. This demurrer was overruled. The defendants then answered, admitting certain extras, but denying extras to the amount set forth in the complaint. The answer further alleged that the plaintiff had issued orders against the defendants totaling $679.97, on which payments had been made in addition to those admitted in the complaint. The answer denied that the work was done in accordance with the contract and affirmatively alleged a great number of particulars in which the house was defective, and claiming damage for defective work and defective material in the sum of $1,179.

The plaintiff, in his reply, admitted the giving of orders in the sum of $529.51, but denied that these orders had been paid; and denied that there was any defective workmanship or defective material, and alleged that the contract had been fully completed.

Upon these issues the case went to trial. Upon the trial, after the defendants had testified that the orders above referred to had been paid in the amount of $627.76, the plaintiff admitted that these credits should be made, so that the controversy was finally reduced to $366.94. After hearing all the evidence, the court concluded that the plaintiff was entitled to a judgment for $150, and for a foreclosure of his lien for that amount, and an attorney's fee. The defendants have appealed from that judgment.

It is argued, first, that the court erred in denying the motion to make the complaint more definite and certain. It is contended that, because the plans and specifications are referred to in the contract, as hereinabove stated, they were a necessary part of the complaint, and should have been attached thereto as a part of the contract. No authorities are cited by the appellant upon this point. We have no doubt that the court, in its discretion, might have required a copy of the plans and specifications to be attached to the complaint

in order to make it more definite and certain; but we are satisfied that its refusal to so direct was not error. The general rule seems to be that:

"Plans or specifications referred to in the contract are not parts of the contract in such sense as to require that they should be filed as exhibits, with a complaint on the contract, in order to authorize their admission in evidence, and it is sufficient to refer to them as parties refer to them in a contract, leaving their identity in case of dispute to be established by parol evidence." 6 Cyc. 93.

See, also, *Bird v. St. John's Episcopal Church*, 154 Ind. 138, 56 N. E. 129. The reason for the rule is stated in *Learmonth v. Veeder*, 11 Wis. *139, 144, where it was said:

"The question then is, whether, in a complaint on a building contract, it is necessary to set forth the plans and specifications mentioned in it, in order to authorize their admission in evidence. And we think it is not. Chiefly for the reason, that in many cases it would be utterly impracticable. The plans and specifications of the building are usually prepared by architects, and require great skill and experience. They consist sometimes of extensive and complicated plates or drawings, which it would often be exceedingly inconvenient, if not utterly impracticable to attach to and make a part of the pleadings in the case. . . .

"These considerations lead to the conclusion that these plans and specifications, although referred to in the contract, and being so much a part of it that they are material to be known in order to determine what it requires, are yet, from their very nature, so far incapable of being inserted in the pleadings, that it must be held sufficient to refer to them as the parties refer to them in the contract, leaving their identity, in case of dispute, to be established by parol evidence."

We conclude, therefore, that it was not error for the trial court not to require these drawings and specifications to be attached to the complaint.

It is next argued that the demurrer should have been sustained because two causes of action were improperly joined. But it is apparent from the complaint itself that the action

is based upon the contract. While nothing is said in the written contract regarding extra work, the specifications which were offered in evidence show that extra work was contemplated. And it is a conceded fact that numerous changes were made in the plans and specifications after the contract was entered into; and agreements were made between the parties as to what this extra work should be done for.

"It is usually held that where the contract is for a building generally extras subsequently ordered will be covered by the lien, at any rate if provision is made in the contract with regard to extras, thereby showing that they were contemplated." 27 Cyc. 51.

We think it is plain from the whole complaint that the basis of the action was upon the particular contract, and not upon a *quantum meruit*.

It is next argued by the appellants that the court erred in receiving certain evidence. The case is tried here *de novo;* and it has uniformly been the practice of this court not to regard errors of this kind, but to disregard evidence improperly admitted in the trial court.

It is lastly strenuously argued by the appellants that the evidence shows the plaintiff did not substantially perform his contract, because of many inperfections in the workmanship and in the material furnished. We have no doubt that if the evidence showed bad faith on the part of the contractor, he would not be entitled to recover. *Schmidt v. North Yakima*, 12 Wash. 121, 40 Pac. 790.

In the case of *Mortimer v. Dirks*, 57 Wash. 402, 107 Pac. 184, we said:

"It is a modern rule that substantial compliance with a building contract is all that is required, and that where the contractor has in good faith and honestly sought to comply with its terms, but has failed in some minor respects, his right of recovery cannot be defeated under the contract, but will be offset by the amount required to complete the contract. Some of the cases holding that substantial compliance only is required hold that the action is properly brought upon the

contract and the amount due thereon is subject to deductions for damages arising from improper performance; while others hold that the contractor is entitled to recover upon a *quantum meruit*. But whatever be the rule of recovery, the reason for it is that a contractor, acting in good faith and with a determination to do what he has contracted to do, should not suffer if he has, unintentionally and without any negligence in some small matter, departed from the strict terms and detail of his specifications."

See, also, *Taylor v. Ewing*, 74 Wash. 214, 132 Pac. 1009.

The specifications in this case provide:

"In case the nature of the defects shall be such that it is necessary to have it corrected, the owner shall have the right to deduct from the contract price, at final payment, such sums of money as would be a fair consideration for any damage to the building or any difference in value between work or material used instead of as hereinafter specified or shown on plans."

The evidence is in conflict as to whether the material furnished was first class, and whether the work was done in a first-class, workmanlike manner. The trial court heard this evidence, and apparently concluded that, upon the whole evidence, the plaintiff had endeavored to faithfully perform the contract. There were undoubtedly minor imperfections; and evidently the court allowed for these, because he reduced the amount claimed, viz., $366.94 to $150, upon the theory, no doubt, that the imperfections in the work and in the materials could be fully compensated for by this difference. We have carefully read the evidence in the case, and conclude that, while there were a number of imperfections, both in workmanship and material used, this amount will fully compensate for these imperfections. Furthemore, it appears that, during the progress of the work, the defendant, or his wife, was upon the work, and noticed its condition the greater part of the time. Many changes were suggested and made at their request. They observed the character of the material, and the character of the workmanship, and apparently

made no objection thereto at the time it was done. Later, they did make objections. After these objections were made, the contractor expressed a willingness to make changes to the satisfaction of the defendants, and sent a man there for that purpose. Objections which were pointed out were remedied. It is apparent to us from a reading of the record that the plaintiff attempted in good faith to fully and carefully perform the contract.

We are of the opinion, therefore, that there was no bad faith, and that the judgment must be affirmed.

MORRIS, C. J., CHADWICK, ELLIS, and FULLERTON, JJ., concur.

[No. 13192. Department One. March 2, 1916.]

ALICE B. JOHNSON, *as Executrix etc., Respondent*, v. F. L. CARR, *Appellant*.[1]

INDEMNITY—CONTRACT—CONSTRUCTION. Where the purchaser of stock in a corporation gave his note for the price at par, and later made an arrangement whereby the payee agreed to take back the stock and satisfy the note when the stock was sold, evidenced by a receipt of the shares of stock "for sale at par," and agreeing to pay the maker any interest he might pay on the note, and reciting "Maturity note sale stock," the agreement was one in effect guaranteeing to pay both principal and interest of the note upon sale of the stock; and upon such sale, the payee was liable for the payment of the note to an indorsee for value, and for cancellation of the note.

JUDGMENT—RES JUDICATA—MATTERS CONCLUDED—IDENTITY OF PARTIES AND ISSUES. Where defendant, the payee of a note, taken in payment for corporate stock, agreed to take the stock back, and guaranteed, upon sale of the stock, to pay the note, which he had indorsed for value, and thereafter, the indorsee of the note recovered judgment thereon against plaintiff, the maker's executrix, in an action in which defendant was not a party, the judgment therein is not *res judicata* or a bar to plaintiff's action against defendant on his guarantee of the note, although the plaintiff (defendant in the former action) sought therein to make the payee a party thereto and set up the whole transaction, charging fraud in the indorsement

[1]Reported in 155 Pac. 778.

of the note, where the court in the former action made no finding on the question of fraud and refused to make defendant a party thereto, but simply found that the plaintiff in the former action was an indorsee for value and the owner and holder of the note; since the issue as to defendant's guarantee was not proper to be tried in a cause wherein defendant was not a party, and the same was not adjudicated in the former action on the note.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered April 27, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Morgan & Brewer and *Gordon & Easterday*, for appellant.

O. M. Nelson, for respondent.

MOUNT, J.—This action was brought to recover against the defendant the amount of a note which the plaintiff was required to pay to the Montesano National Bank. The case was tried to the court and a jury, and resulted in a judgment in favor of the plaintiff. The defendant has appealed.

The complaint alleges:

"That on or about the 1st day of July, 1911, J. J. Johnson, deceased, purchased from F. L. Carr, the defendant herein, twenty-five shares of stock of the Montesano General Hospital, a corporation duly organized and existing under and by virtue of the laws of the state of Washington; that the said J. J. Johnson gave his note in payment for such shares in the sum of $2,500 to the said Carr; that thereafter on January 4, 1912, the said J. J. Johnson, deceased, renewed said note by giving the said defendant Carr a new note therefor in the sum of $2,500; that the said F. L. Carr negotiated the said note with the Montesano National Bank.

"That on or about the 9th day of January, 1912, the said J. J. Johnson, deceased, made an arrangement with the said defendant, F. L. Carr, that the said F. L. Carr should take said stock of the Montesano General Hospital at par, and satisfy the said note whenever the said stock was sold by the said F. L. Carr; that the said transaction is evidenced by the following receipt in words and figures as follows:

January 9, 1912.

Received of J. J. Johnson for sale twenty-five hundred stock in Montesano Gen. Hospital at par & I agree to pay him any interest he may pay on note for twenty-five hundred dollars. Date of Jan. 9, 1912, at 8 per cent. Maturity note sale stock. F. L. Carr.

"That thereafter, on or about the 14th day of January, 1913, the said F. L. Carr notified the plaintiff herein that he had sold said stock, and claiming that he had cancelled a note dated January 9, 1912, given by said J. J. Johnson for such stock.

"That no note was ever given by the said J. J. Johnson, deceased, to the said F. L. Carr dated January 9, 1912; that in truth and in fact the only note given the said F. L. Carr by the said J. J. Johnson, deceased, was the renewal note dated January 4, 1912; that the said F. L. Carr on said January 9, 1912, agreed to hold the said J. J. Johnson, deceased, harmless as to said note of January 4, 1912."

The complaint then alleges that the Montesano National Bank thereafter brought an action upon the said note and obtained a judgment against the plaintiff for the sum of $2,500 principal, $295.55 interest, $15.80 costs, and an attorney's fee of $200; and that the plaintiff was required to, and did, pay said judgment. The prayer is for the amount of the note, with interest, costs, and attorney's fees.

The defendant demurred to this complaint on the ground that it did not state facts sufficient. This demurrer was overruled, and an answer was filed which admitted the purchase of the stock by J. J. Johnson from Carr, and denied that the note was renewed on January 4, but alleges that the same was renewed on January 9; and admitted the obtaining of the judgment by the Montesano National Bank. After pleading further affirmative defenses not necessary to be noticed, the defendant for further answer alleged that the matters and things set up in the plaintiff's complaint were adjudicated in the action of the Montesano National Bank against the plaintiff, and that the issues now sought to be raised were adjudicated in that action.

The appellant makes two principal contentions upon this appeal. The first is that the court erred in overruling the demurrer to the complaint. It is argued upon this contention that the complaint itself shows that there was no agreement by Dr. Carr to save the plaintiff harmless against the note named. It is argued that the receipt copied in the complaint is an agreement only to pay the interest upon the note. But it is apparent, it seems to us, from the allegations of the complaint, that this receipt is more than an agreement on the part of Dr. Carr to pay interest. It is alleged that he took this stock of the hospital to be sold by him at par "and satisfy the said note whenever the stock was sold." He had in his possession at that time the note signed by Mr. Johnson for $2,500, the purchase price of the stock. Having the stock and note in his possession, the note being payable to Dr. Carr, he agreed to pay the interest which Mr. Johnson might be required to pay on the note. It was not necessary that he should agree to pay the note to Mr. Johnson, because the note was not payable to Johnson; it was payable to Carr. Upon the sale of the stock, Carr was to cancel the note. His indorsement of the note when it was transferred to the bank was an agreement as between himself and the bank to pay the note. The maturity of the note, according to the receipt, was the sale of the stock. When the stock was sold by him at par, the note, so far as Dr. Carr was concerned, was paid. It was his obligation, then, to pay the note, both principal and interest, held by the bank. The effect of this receipt was to guarantee both principal and interest, because if the stock was sold as alleged, Dr. Carr had the money he received from the bank, and also $2,500 from the sale of the stock. He therefore was liable for the payment of the note to the bank, and for a cancellation of the note. We think the complaint was sufficient.

It is next contended that the action brought by the bank upon the note was *res judicata* of the right of the plaintiff to recover against Dr. Carr. It seems that, at the time this

note was given by the deceased to Dr. Carr, or shortly thereafter, Dr. Carr indorsed the note to the bank and received value therefor. Thereafter the bank brought an action against the estate of Mr. Johnson without making Dr. Carr a party. The executrix attempted to defend that action upon the ground that the note was fraudulently transferred by Dr. Carr to the bank without any consideration; and the whole transaction between Mr. Johnson and Dr. Carr was set up in the answer to that action. The answer prayed to have Dr. Carr made a party. He was not made a party to that action; but evidence was introduced apparently to the effect alleged in the complaint in this action. The court made no finding, however, upon the question of fraud, but found in that action as follows:

"That on or about the 4th day of January, 1912, the decedent, J. J. Johnson, made, executed, and delivered to F. L. Carr, his certain promissory note, payable on demand, in the sum of $2,500, with interest at 8% per annum. That at the same time and as a part of the same transaction, the said F. L. Carr endorsed said note to the plaintiff, Montesano National Bank, for value. That the plaintiff is now the lawful owner and holder thereof."

So it is apparent that the only issue necessarily decided by the court in that action was whether the bank obtained the note from Dr. Carr for value; and so finding, the trial court entered judgment against the estate of Mr. Johnson for the face of the note, with interest, costs, and attorney's fees. We are satisfied that this was not an adjudication of the fact that Dr. Carr was not required to cancel the note as against the deceased, or his estate. It seems plain that such issue was not proper to be tried in that case, for Dr. Carr was not made a party, and the question was not adjudicated as between Dr. Carr and the plaintiff in this case. The only question submitted to the jury upon the trial of this case was stated by the court in an instruction as follows:

"In this case the plaintiff claims, in substance and effect, that the certain note which was sued upon in the former ac-

tion in this court was a note which Dr. Carr had agreed to protect Johnson against; in other words, it was a Carr note and not a note of the bank, as I understand the case; and the burden of proof is upon the plaintiff to establish her cause by a preponderance of the evidence. If you find from the evidence that Dr. Carr, the defendant in this action, agreed to protect Johnson against this note, and failed to do so, then you should find for the plaintiff; unless you find from a preponderance of the evidence that he did so agree, then you should find for the defendant."

This presented simply two questions for the jury: First, was the note in this action the same note which was sued upon by the bank; and second, did Dr. Carr agree to protect Johnson against this note. Those were the controlling issues in this case. We are satisfied from the evidence that the finding of the jury was amply sustained upon both questions; that the note was the same, and that Dr. Carr did agree to protect Mr. Johnson against not only the interest, but the face of the note, in case the stock was sold as he had agreed to sell it. The evidence clearly shows that Dr. Carr wrote a letter to the plaintiff stating that he had sold the stock and canceled the note. This cancellation was made, not by returning the note, but was canceled by clippng off the signature of Mr. Johnson from some paper, and returning the signature alone to the plaintiff. This circumstance, in our opinion, is sufficient to taint the transaction as an endeavor to show that the note sued upon by the bank was a note other than the one given by Mr. Johnson to Dr. Carr for the purchase price of the hospital stock.

We are satisfied, therefore, that the complaint states a cause of action; that the adjudication upon the note sued upon by the bank was not an adjudication of the rights of the plaintiff and Dr. Carr in this action; and that the evidence is sufficient to sustain the judgment.

The judgment is therefore affirmed.

MORRIS, C. J., ELLIS, and FULLERTON, JJ., concur.

[No. 13198. *En Banc.* March 2, 1916.]

THE STATE OF WASHINGTON, *Appellant*, v. POWLES & COMPANY, *Respondent*.[1]

FACTORS—REGULATION — "COMMISSION MERCHANTS" — STATUTES — DEFINITENESS. Rem. & Bal. Code, § 7033, regulating commission merchants, who are defined as persons whose "principal" business is the sale of farm, dairy, orchard or garden produce on account of the shipper, and making it a misdemeanor for them to do business without a license, is void; since the definition attempted is fatally vague and fails to sufficiently indicate to whom the law is applicable.

STATUTES—PARTIAL INVALIDITY—EFFECT. Since it cannot be said that Rem. & Bal. Code, § 7033 *et seq.*, regulating commission merchants, would have been passed without any definition of the persons to whom the act was to be applied, the indefiniteness of the definition of commission merchants pervades the act and renders the whole statute void.

HOLCOMB, J., dissents.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered September 30, 1915, upon sustaining a demurrer to the information, dismissing a prosecution for a violation of the commission merchants' law. Affirmed.

The Attorney General and *Edward W. Allen, Assistant, Alfred H. Lundin*, and *Frank P. Helsell*, for appellant.

James Kiefer and *Bogle, Graves, Merritt & Bogle*, for respondent.

BAUSMAN, J.—This is an appeal by the state from a judgment sustaining a demurrer to a criminal information charging defendant with conducting a commission merchant business without a license.

In *State v. Bowen & Co.*, 86 Wash. 23, 149 Pac. 330, we decided that a requiring of licenses from commission mer-

[1]Reported in 155 Pac. 774.

chants and the imposing of sundry regulations on their business is a valid exercise of police power, and that the constitutionality of the act, chapter 139, Laws of 1907, p. 266; Rem. & Bal. Code, §§ 7024-7035 (P. C. 91 § 1), enacted under that power, could not be questioned by the defendant then involved. In the present instance it can be questioned. The information charges this defendant's business to be of the commission sort to the extent of twenty-five per cent, while the act defines "commission merchant" as follows:

"For the purpose of this chapter a commission merchant is defined and declared to be any person, firm or corporation whose principal business is the sale of farm, dairy, orchard or garden produce on account of the shipper or consignor." Rem. & Bal. Code, § 7033 (P. C. 91 § 19).

The defendant's commission business, then, must be the "principal" part of his traffic. Explaining why it seeks to hold the defendant liable when it charges his commission business to be but twenty-five per cent of his traffic, the state argues that the word "principal" does not mean "major," as the lower court in discharging the defendant held, but "regular" as distinguished from "casual," and that if this be not the definition of the word, then the definition attempted in the act was repugnant to the rest of it and should be thrown out entirely, in consequence of which the defendant should be held as if there were no definition at all.

The definition attempted in the statute is fatally vague. Is the principal part of a business fifty-one per cent of mere pecuniary receipts? One may do a business in which only forty-nine per cent in gross receipts is of the commission sort, and yet in which that sort is the most profitable. When one has total receipts of $100,000 per annum, the commission part may be but $20,000, and yet his ten other kinds of business might bring in less than $10,000 each. Thus, in both gross and net profits, the commission department might bring in less than half of all the others put together, and yet bring in much more than any one. There, in one sense, the

chief business would be of a commission kind. Would it, though, be the *principal*, within this statute, when it is principal only by that kind of comparison? We are unable to say. We cannot hold, as the lower court did, that "principal" means either gross majority in profits or more than half of all the receipts, or that it means more than any other one kind of receipts. Accordingly, upon the mere basis of money, the statutory definition is vague beyond hope.

But perhaps the legislature meant by "principal" that which brings the most customers or the most transactions, as where, though only thirty per cent in receipts is of the commission sort, the latter has several times as many transactions as all the others put together. Thus, suppose the commission department causes a thousand transactions and yet constitutes a minority in money received, while the other departments, bringing in fifty-one per cent of the total money, are but a hundred in number, shall it be said that the commission business is not the principal one there?

Finally, during how long a period is the test to be applied? Is it the seasonal or the annual receipts that shall control, or is it a view of the man's business during two or three years? Shall a merchant only starting in business and opening a commission department be judged immediately, or shall the state wait a year or two until his status is reasonably established?

This sufficiently answers also the state's attempted definition of the word "principal." We cannot say that this word meant regular rather than casual, for who shall define what is regular or what is casual? Some casual transactions may be of great moment and bring in, during a considerable period, a large excess of gross receipts.

Vague though the statute is, there is here an attempt to punish people criminally for violating it. As to the state's argument that we should now throw out this vague section and go on with the rest, that cannot be considered. This is

far from a situation where that is permissible. That we can do only when it is clear that the legislature would have passed the act even without the ejected provision. But nobody can say here that it would have done so. The very contrary is apparent. In our opinion, nobody would have been willing to pass this act without some definition of "commission merchant," for if there were no definition at all, then it could be said that a trader who did a $1,000,000 worth of business with only $10,000 of it in the commission department was within the act, a conclusion we are satisfied to which nobody would have agreed. To insert some definition was therefore imperative.

The definition pervades this act. It is essential to all of it, and the whole statute is void through its undeniable deficiency. The lower court was right in sustaining the demurrer and dismissing the action. Judgment affirmed.

MORRIS, C. J., MOUNT, PARKER, MAIN, and ELLIS, JJ., concur.

FULLERTON, J. (concurring)—In the foregoing opinion the majority of the court hold that the defendant cannot be convicted of a misdemeanor on the information filed against it, because of the invalidity of the statute on which the prosecution is founded. With this holding, and with the major part of the opinion stating the reasons for so holding, I agree. This was the conclusion reached by Judge Chadwick in his dissenting opinion in the case of *State v. Bowen & Co.*, 86 Wash. 23, 149 Pac. 330, in which I concurred.

I cannot agree, however, with the conclusion of the majority to the effect that this case can be differentiated from the case cited. In that case, the defendant admitted the facts charged against it and defended in the lower court, and appealed to this court on the sole ground that the statute under which it was being prosecuted was unconstitutional and void. The defendant in this case made the same defense, with

the additional defense that the statute had no application to its business. The only difference between the cases is that in the one the defendant's principal business was of the sort the statute seeks to regulate, while in the other only twenty-five per centum of its business is of that sort. But this, in my opinion, does not warrant the distinction made. I think it clear that if the constitutional question can be raised by the defendant in this case it could, for a much stronger reason, have been raised by the defendant in the earlier one. There the defendant was convicted and sentenced to pay a fine; here the defendant was adjudged not guilty of a violation of the statute, and we have the anomaly of one convicted under a void statute being unable to raise the question of the validity of the statute, while another, held not guilty of violating its provisions, being able to do so. Each of them, I think, can raise the question; but if either cannot, it seems to me it is the present defendant, not the other.

But, if both of these decisions can stand as law, we have an anomaly more curious to my mind than even the one suggested. The majority, I do not understand, mean to hold that the inability to raise the constitutional question was personal to the defendant in the case of *State v. Bowen & Co.*, but mean rather to hold that no defendant in its situation can raise it. The effect of the decisions, then, is this: Under the authority of the first case, a commission merchant whose principal business is of the sort sought to be regulated by the void statute can be convicted of a violation of its provisions because he is not in a position to raise the question of its validity, while under the authority of the present case, a commission merchant whose business is only twenty-five per centum of the regulated sort cannot be so convicted, even though his business violates the provisions of the statute, because he is in a position to raise the question.

With all due respect to the majority, I cannot think this conclusion sound. In my opinion, the later case of necessity

overrules the earlier one, and I think the court should so declare in terms, not leave the question open to further litigation.

CHADWICK, J. (concurring)—I think this case overrules the *Bowen* case, and very cheerfully concur in the result.

HOLCOMB, J., dissents.

[No. 12668. *En Banc.* March 4, 1916.]

LOUISE B. POND, *Guardian, Respondent*, v. KATHERINE L. FAUST *et al.*, *Appellants*.[1]

WILLS—JURISDICTION—VALIDITY—DETERMINATION DURING LIFE OF TESTATOR—ACTIONS. The courts have no jurisdiction to compel the surrender and cancellation of a purported will of an insane ward, at the suit of her guardian during her lifetime, or in the alternative, entertain the suit to perpetuate testimony as to her mental condition at the time the will was executed; since the courts have no jurisdiction over wills except as given by statute, and the guardian has no interest either in establishing or disestablishing a will of his ward.

Appeal from a judgment of the superior court for King county, Tallman, J., entered October 1, 1914, in favor of the plaintiff, in an action by a guardian to compel the production and cancellation of a will of an insane person, after a hearing before the court. Reversed.

C. M. Miller, for appellants.

Mitchell & Lawrence, for respondent.

HOLCOMB, J.—In this case respondent, as guardian of Mary S. Pond, an insane person, attempts to compel the surrender of a purported will of her ward to be annulled and canceled, on the ground that the testatrix was insane and incompetent at the time of its execution. It is further al-

[1]Reported in 155 Pac. 776.

leged, that the instrument purporting to be a will was prepared by appellants and procured by them from the ward without her knowledge of its contents, and by fraud; that it was procured by appellants in order that they might gain control of the ward's estate after her death; that it is wrongfully withheld from the guardian; that, if permitted to remain outstanding or its provisions attempted to be asserted or carried out after her death, it will work an injustice to her estate and her lawful heirs; that, if attempted to be probated after the death of the ward, her estate or her heirs will be subjected to great expense in resisting same or to prevent appellants from gaining an improper and unwarranted control of her estate by reason of it; that such witnesses as know of the mental condition of the ward at the time of the making of the instrument can now be obtained and brought before the court; that they are liable to die or cannot be produced after the death of the ward; that it is now necessary to take this procedure to determine the validity of such instrument and to perpetuate the testimony of such witnesses, and there is danger of the loss of evidence; that the estate of the ward is endangered by the outstanding of the instrument; that the ward is greatly distressed, worried, annoyed and disturbed in mind by reason of the outstanding of the instrument, which condition cannot be overcome unless it is delivered up and canceled by the court; that the guardian is unable to secure the instrument without the aid of the court. Respondent also prayed for alternative relief that, if the court refused to cancel the instrument, the testimony relating to the mental condition of the ward when the instrument was executed be taken and perpetuated.

Upon the filing of the petition, a citation was issued to appellants, which they moved to quash on the ground that the court had no jurisdiction to entertain the matter; and at the hearing, they objected to the jurisdiction of the court on the ground that the testatrix was still alive, that the guardian had no interest in the will prior to the decease of the testatrix,

and that the proceedings were of the nature of a contest of the will. The motion was denied, the objection overruled, and the court proceeded to hear and determine the matter. The court found that Miss Pond was insane at the time of making the will, ordered it taken from the possession of the depositee, Miller, and annulled, but held in safekeeping in the files of the court.

The will was executed in January, 1914, and delivered to Miller, an attorney, as custodian, for safekeeping. Appellant Faust was named in the will as executrix. In May, 1914, Miss Pond was adjudged insane, and respondent, a sister-in-law, was appointed her guardian.

The case is one where we can get no help from judicial precedents. It is admitted that such a proceeding is unheard of in this country or England, and that there is no statutory authority to compel the production of a will or to enforce its cancellation during the lifetime of its maker.

It is claimed by respondent, however, that "because an action is new and without precedent is not conclusive against recovery if it is shown that a wrong has been suffered." *Kujek v. Goldman*, 150 N. Y. 176, 44 N. E. 773, 55 Am. St. 670, 34 L. R. A. 156; *Piper v. Hoard*, 107 N. Y. 73, 13 N. E. 626, 1 Am. St. 789; Story, Equity Pleading (10th ed.), 473. That is true, and the courts of common law and of equity in this country have ever been most eager and ingenious to admit or to provide an adequate remedy for a wrong suffered where none existed before. But what wrong has been suffered, or what is impending? It must be conceded without quibble that a will made by an insane or otherwise incompetent person is a nullity. The same is true of any instrument made by an insane person.

"The right to make a testamentary disposition of property is neither a natural nor a constitutional right. Such right is derived from and rests in positive law. A will is said to be ambulatory until the death of the testator, and until that event occurs the testamentary disposition is subject to

the will of the testator, and likewise to the will of the state as expressed in its public laws. The will speaks as of the date of the testator's death, . . ." *Strand v. Stewart*, 51 Wash. 685, 99 Pac. 1027.

Until a man dies he has no heirs. It can never be known before then, even if he die intestate, who will succeed him and be legally found to be his heirs. It is even possible that he may consume his entire estate during life and at death have no estate to pass by will or otherwise.

"The broadest definition ever given to the judicial power confines it to controversies between conflicting parties in interest, and such can never be the condition of a living man and his possible heirs." *Lloyd v. Wayne Circuit Judge*, 56 Mich. 236, 23 N. W. 28, 56 Am. Rep. 378.

Here we have not even the possible heirs seeking relief. But we are cited to the statutes (Rem. & Bal. Code, §§ 1659, 1662; P. C. 409 § 757, 763), making it the duty of a guardian to prosecute any action pending by or against the ward, or thereafter to be commenced by or on account of the ward; and to collect and take possession of the goods, chattels, moneys, effects, and other evidences of debt, and all writings touching the estate, real and personal, of the ward.

"The last will and testament of the ward is not an asset. Neither is it an instrument which the guardian could use in the recovery of an asset. It can not in any way relate to any matter within his power or duties, or in any manner affect his action as a guardian, because it cannot take effect until after his authority has ceased. He certainly cannot annul, revoke, destroy, or in any way dispose of it, nor can the court authorize him to do so; . . ." *Mastick v. Superior Court*, 94 Cal. 347, 29 Pac. 869.

And, as in the case above quoted, the appellant Miller "is charged with the execution of his trust—the safekeeping of the will"—delivered to him for that purpose. That trust could be revoked only by Miss Pond herself. The court had no jurisdiction whatsoever, either to "compel a surrender and cancellation of the will, or to perpetuate testimony as to the

mental condition of Miss Pond at the time the will was executed," as prayed alternatively by the respondent.

In *Lloyd v. Wayne Circuit Judge, supra*, it was declared that even a statute providing for the *ante mortem* adjudication of the validity of a will and its admission to probate was invalid. This is upon sound principle and reason; and manifestly the converse is equally true, that courts have no power to inquire into the validity of wills prior to the death of the maker, to determine the *incompetency* of the maker.

Our statute, Rem. & Bal. Code, § 1289 (P. C. 409 § 75), provides that "any person having the custody of any will, shall, within thirty days after he shall have received knowledge of the death of the testator or testatrix, deliver said will into the superior court which has jurisdiction, or to the person named in said will as executor;" and provides penalties for willful failure or neglect so to deliver. Sections 1293, 1294 (P. C. 409 §§ 87, 89), provide for a petition and order to deliver such will by the custodian "to be admitted to probate." It is certain that the will cannot be "admitted to probate" except after the death of the testator. Section 1297 (P. C. 409 § 95) provides that the court shall, upon the production and exhibition of the will, receive the proof and issue a certificate of probate or of rejection. When the will is offered for probate, there must be proof that the deceased was of sound mind when the will was executed. *In re Baldwin's Estate*, 13 Wash. 666, 43 Pac. 934; *Higgins v. Nethery*, 30 Wash. 239, 70 Pac. 489.

Sections 1307-1311, Rem. & Bal. Code (P. C. 409 §§ 115-123), provide how and when wills may be contested, "at any time within one year after the probate thereof." Wills being creatures of the statute, these various statutes are most assuredly fully comprehensive and exclusive, and aside from their directions, no court has any jurisdiction of any kind over wills.

Furthermore, the guardian has, or should have, no interest whatever either in establishing or disestablishing a will of

his ward. He has no authority in the matter. He might possibly have sufficient special interest and right of possession to authorize him to maintain a replevin suit to recover its possession for safekeeping from one in unauthorized possession of it, but no more. The law provides a method of custody and safekeeping of wills only for the purpose of safety and repose, but otherwise does not notice wills during the lifetime of their makers.

The judgment is reversed and the proceeding dismissed.

PARKER, MOUNT, MAIN, ELLIS, FULLERTON, and BAUSMAN, JJ., concur.

[No. 13113. Department One. March 4, 1916.]

THOMAS A. LOW *et al.*, *Respondents*, v. A. V. McDONALD, *Appellant.*

FRED LOW, *Respondent*, v. A. V. McDONALD, *Appellant.*[1]

MALICIOUS PROSECUTION — DEFENSES — CHARGE BY PROSECUTOR — TRUTH OF FACTS STATED — QUESTION FOR JURY. It is no defense to an action for malicious prosecution that the prosecuting attorney, to whom the matter was presented by defendants, abandoned a complaint of grand larceny on which plaintiffs were arrested and bound over, and filed an information and tried them for burglary in the second degree, on which they were acquitted; since the truth of the charge, whatever it was called, and whether the defendants fully and fairly stated all of the facts to the prosecuting attorney, were questions for the jury.

MALICIOUS PROSECUTION — EVIDENCE — FELONIOUS INTENT — ADMISSIBILITY — ORAL AGREEMENT TO VARY WRITING. In an action for malicious prosecution in charging plaintiffs with burglary in entering and taking goods covered in a bill of sale from plaintiffs to defendants, it was competent for plaintiffs to prove an oral collateral agreement reserving the goods, to show their good faith and want of felonious intent in the taking; since the bill of sale would not be conclusive on that issue in a criminal action.

CRIMINAL LAW — APPEAL — REVIEW — INSTRUCTIONS — REQUESTS. Error cannot be predicated upon the failure to give an instruction that

[1]Reported in 155 Pac. 748.

a bill of sale would not be overcome by a mere preponderance of the evidence, in the absence of any request for such an instruction.

TRIAL—INSTRUCTIONS—COMMENT ON EVIDENCE—INSTRUCTIONS AS A WHOLE. While an instruction, standing alone, might be a comment on the evidence, it must be considered in connection with the other instructions and not taken from its setting.

MALICIOUS PROSECUTION — INSTRUCTIONS — WANT OF PROBABLE CAUSE. In an action for malicious prosecution, an instruction that, if the facts were not sufficient to induce in the minds of reasonable persons a belief in the guilt of the accused, then there would not be probable cause for the prosecution, is not erroneous as relieving the plaintiffs of the burden of proving want of probable cause.

COSTS—ITEMS—WITNESS FEES. Costs may be taxed for witnesses subpoenaed although they were not sworn or their testimony was held inadmissible.

COSTS—ITEMS—APPEARANCE FEES. Appearance fees are properly taxed, although the venue was changed to another county where defendants resided.

MALICIOUS PROSECUTION — DAMAGES — EXCESSIVENESS. Separate verdicts for malicious prosecution in favor of a husband and wife for $1,250, each, are excessive and should be reduced to $750, each, where it does not appear that the plaintiffs have been hurt in their standing or character.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered May 8, 1915, upon separate verdicts of a jury rendered in favor of the plaintiffs for $1,250, in consolidated actions for malicious prosecution. Reversed, unless $500 is remitted from each verdict.

T. P. Fisk and *Myers & Johnstone*, for appellant.

Troy & Sturdevant and *A. J. Falknor*, for respondents.

CHADWICK, J.—Thomas A. Low and Sarah Low, his wife, sold a farm to the appellant, A. V. McDonald. At the time the sale was made, they executed a bill of sale conveying certain live stock, poultry, wagons, farm machinery, "tools, household goods, furniture, and everything that pertains to the place." Both Mrs. Low and her husband testified that, notwithstanding the terms of the bill of sale, certain property was reserved. It seems to be undisputed that the Lows

did box up certain articles of clothing, personal effects, and some of the things that had been used in and about the house. Appellant was at the ranch at the time. It was inconvenient for them to move these boxes and a trunk and they were left in a tool house on the place.

Thereafter the appellant conceived that the Lows had taken property that did not belong to them. He accordingly notified them that they should take nothing from the place until the boxes were repacked in his presence. He put a lock upon the building in which the boxes were stored.

Mrs. Low and appellant undertook to meet in Seattle and discuss the matter. Both parties say that they were at the appointed place, and that the other party did not attend. However that may be, Mrs. Low and her son left Seattle and went to the town of Shelton, and thence to the ranch, where they secured the goods. The respondent, Fred Low, drew the staples that secured the hasp. When appellant found that this had been done, he went to the prosecuting attorney of Mason county, and upon a statement of the facts as he understood them, the prosecuting attorney caused a warrant to issue and Mrs. Low and Fred Low were arrested in Seattle and taken before a justice of the peace in Mason county for a hearing upon the charge of grand larceny. They were bound over to the superior court. Before the case came on for hearing, the prosecuting attorney filed an information charging the respondents with the crime of burglary in the second degree. The cause went to trial before a jury, resulting in a verdict of acquittal.

Appellant contends that he is not liable to answer in damages, for the reason that the respondents were not tried and acquitted upon the charge made by him; that, when the prosecuting attorney abandoned the charge of grand larceny and charged burglary in the second degree, the state assumed all responsibility for the charge; that respondents are still subject to the charge of grand larceny and a trial thereupon.

There is no merit in the contention of appellant that the filing of the information charging burglary in the second degree upon the same state of facts is sufficient to exempt him from civil liability. The right of the prosecuting attorney to so conduct the public business coming to his notice has been affirmed by this court in *Jones v. Jenkins*, 8 Wash. 17, 27 Pac. 1022. The truth of the charge, whether it be called one thing or another, and the basic fact, whether appellant fully and fairly stated all of the facts of the case to the prosecuting attorney, were questions for the jury, and they have been passed upon adversely to the appellant.

It is urged that the court erred in giving certain instructions to the jury. The court instructed that, notwithstanding the bill of sale and its general terms, if the jury believed from the evidence,

". . . that it was the understanding of the parties that the personal property which the plaintiffs subsequently removed was reserved by the plaintiff, then they would not be bound by the bill of sale in a criminal action. There would be no felonious intent to take the same if the parties had between themselves, outside of any written instrument, an understanding that the property in question belonged to the plaintiffs."

Appellant contends that the bill of sale should be conclusive as to what was sold. A case of this kind is tried under the rules of evidence pertaining to criminal law, and we have no doubt that it was competent for the respondents to prove a collateral agreement exempting part of the property to show their good faith, that is, that they had no felonious intent. Appellant insists, however, that upon any theory a bill of sale should not be overcome by a mere preponderance of the evidence, but that the proof should be clear and convincing. Granting, but without admitting, that this rule would prevail in a case of this kind, we find no request for an instruction upon this theory.

It is also urged that the court instructed the jury:

"The owner of the goods who has a right to possession cannot commit larceny of them by taking them from another person, and under the laws of this state, I instruct you, that it was not a crime for the plaintiffs to remove the staple, or otherwise open the outhouse, for the purpose of securing the goods which were theirs, or which they in good faith believed to be theirs. It is only a crime to break open a building for the purpose of committing a crime therein, and, as I have instructed you, it is not a crime to take possession of goods which belong to a person or which the person believes in good faith belong to them."

This instruction was objected to as a comment upon the evidence. Standing alone, it might appear to be so, but when taken in connection with other instructions wherein the court told the jury that they must find that the goods belonged to the respondents, and that by a preponderance of the evidence, we are not inclined to take the instruction from its setting and construe it as if it stood alone.

It is complained also that the court instructed the jury:

"That if the facts surrounding the arrest and prosecution of the plaintiff, Sarah Low, for burglary in the second degree were not sufficient to induce in the minds of reasonable persons a belief in the guilt of the accused, then there would not be probable cause for the prosecution."

It is said that these instructions relieved the respondents from the obligation that was upon them to show the want of probable cause, for the reason that appellant had nothing to do with the charge of burglary in the second degree. Our holding upon the first assignment of error disposes of this contention. The instruction did not relieve the respondents of the burden of proving a want of probable cause. It goes no further than to announce a rule from which the jury might infer a want of probable cause.

"If, in a criminal proceeding, the facts were not sufficient to induce in the mind of a reasonable man a belief in the guilt of the accused, they would not constitute probable cause." *Waring v. Hudspeth*, 75 Wash. 534, 135 Pac. 222.

The court instructed the jury very fully and fairly upon the law of the case, and the instructions, when taken altogether, are without error.

Appellant further contends that he has been charged improperly with certain costs, in that witnesses were subpoenaed who were not sworn to testify, or it being ruled that their testimony was inadmissible. We think the items were properly allowed. *Dolan v. Cain*, 59 Wash. 259, 109 Pac. 1009; *Hofstetter v. Sound Trustee Co.*, 67 Wash. 537, 122 Pac. 6.

It is also complained that the appellant should not have been charged with appearance fees, inasmuch as the actions were brought in Mason county, whereas the venue was changed to the county of King, that being the place of appellant's residence. We find no merit in this contention.

The jury returned a verdict in favor of each of the respondents in the sum of $1,250. It is complained that this is excessive. This is an unfortunate case. The court instructed the jury that they should fix damages as compensation, and not by way of punishment. It does not appear that either of the respondents has been hurt in standing or character. We believe that $750 in each case is ample compensation.

The case will be remanded, and if, within thirty days thereafter, respondents file a remission of judgment to the extent of $500 in each case, the judgment will stand affirmed, otherwise a new trial will be granted.

MORRIS, C. J., MOUNT, FULLERTON, and ELLIS, JJ., concur.

[No. 12844. Department Two. March 7, 1916.]

CALHOUN, DENNY & EWING, *Appellant*, v. DAVID WHITCOMB, *Respondent*, ERNEST M. WHITCOMB, *Defendant*.[1]

TRIAL — WITNESSES — CREDIBILITY—COMMENT BY COURT—INSTRUCTIONS—ARGUMENT OF COUNSEL. A nonresident defendant who had not been served and who had not appeared, but testified for his codefendant, is not singled out and given special standing before the jury as to his credibility by instructions and rulings of the court to the effect that his nonappearance as a party was not to be considered as affecting his credibility or to be considered to his prejudice; and the court properly restrained argument inviting the jury to draw the inference that his nonappearance as a party was a circumstance to be considered by the jury in judging his credibility (MORRIS, C. J., dissenting).

PARTNERSHIP—ACTIONS—EVIDENCE — INSTRUCTIONS — BROKERS — CONTRACT. In an action against two brothers, D. & E., to recover a broker's commission for negotiating the purchase of stock in a corporation which the brothers controlled as conservators of their father's estate, the fact that D., in declining to purchase, referred plaintiff to E. and the estate in the East, and that E. there entered into a tentative agreement with plaintiff agreeing to pay the commissions, is not evidence that D. and E. were partners in the purchase of the stock; and it is proper for the court to instruct the jury that there was no evidence of a partnership and that the agreement made by E. would not be binding on D. without his consent, and his liability could only be fixed by evidence of prior authorization or subsequent ratification; for even if the brothers were interested together, the rules relating to the authority of general partners would not apply to a special or limited partnership or to a joint venture.

BROKERS—ACTIONS FOR COMMISSIONS—INSTRUCTIONS. In an action to recover a broker's commission for negotiating a purchase of stock, an instruction to the effect that a broker engages to obtain for his employer the contract which he was authorized to submit, is not prejudicially erroneous, when considered as a whole in connection with other parts fully and fairly setting forth the duty of the broker merely to induce the owner of the stock to consent to enter into the contract, such owner being ready, able and willing to carry out the contract.

SAME. In an action to recover a broker's commission for negotiating a purchase of stock, which defendant claimed was dependent

[1]Reported in 155 Pac. 759.

upon converting other common stock held by defendant as trustee into preferred stock, so that the contract took advantage of defendants trust position for his personal benefit and was void as against public policy, an instruction as to its invalidity for that reason is not prejudicially erroneous, when considered in connection with other instructions as to the presumption of honesty of action in such a case, and that the broker would nevertheless be entitled to his commissions, regardless of whether the parties contemplated a violation of law or the commission of a fraud, unless he knowingly participated in some way in the illegality or fraud.

SAME—INSTRUCTIONS—COMMENT ON EVIDENCE. In an action to recover a broker's commission for negotiating a purchase of stock, an instruction calling attention to the particular features of the case, and to the particular phases to be determined as to the probability or improbability of the truth of the evidence, cannot be said to be unfair comment on the evidence such as is prohibited by the constitution, or an argument in favor of either party, where it takes cognizance of the theories of both parties, and is more favorable to the appellant than the respondent.

SAME. In such an action, where the oral agreement to pay the broker's commissions was dependent upon the proposed contract to purchase the stock, a written memorandum of which was drawn up but not executed, being called a tentative agreement, and the purchase was part of the broker's contract of employment, it is not error for the court to instruct the jury that, unless the negotiations between the parties did result in an actual present agreement, as distinguished from a proposed proposition to be considered in the future, the defendant was not liable; especially where another part of the instruction relating to the necessity of a meeting of the minds of the parties showed clearly that the instruction as a whole related to the oral contract of employment of the plaintiff and properly submitted a disputed question of fact as to whether the things said constituted the agreement, or merely resulted in the giving of a writing which was to form the basis of a future agreement.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 17, 1914, upon the verdict of a jury rendered in favor of the defendant, in an action for a broker's commission. Affirmed.

Donworth & Todd, for appellant.

Albert H. Beebe and *Turner, Hartge & Turner*, for respondent.

HOLCOMB, J.—The complaint of plaintiff in this action, alleging that it is a Washington corporation engaged in the loan, brokerage, and real estate business in Seattle, and that defendants were associated together in a joint business enterprise in the transactions referred to in the complaint, and were and are partners for the purposes of those transactions, further alleged that, between June 28, 1912, and July 11, 1912, defendants employed plaintiff as a broker to negotiate the purchase in their behalf of 2,500 shares of the stock of the Arcade Building & Realty Company, which shares were then owned by A. W. Denny Company, and which shares defendants desired to purchase. It is further alleged that, for that purpose, defendants made and delivered to plaintiff a written memorandum, which is set forth by copy, stating the terms upon which the shares of the common stock of the Arcade Building & Realty Company were to be purchased and the price to be paid therefor. It is further alleged that, by the contract of employment, the defendants promised and agreed with the plaintiff that, if plaintiff should negotiate a purchase for them of the 2,500 shares of common stock of the Arcade Building & Realty Company by procuring the A. W. Denny Company to sell the stock on the terms set forth in the written memorandum, the defendants would pay plaintiff, as a commission for such services, the sum of $10,000.

The complaint further alleges, that the plaintiff duly negotiated the purchase of the stock and procured the A. W. Denny Company to sell the stock, and persuaded and induced it to sell and convey the stock upon the terms set forth in the written memorandum; that the A. W. Denny Company was then and there ready, able, and willing to sell and convey the stock to the defendants on the terms prescribed in the written memorandum; that plaintiff notified defendants thereof; that it duly carried out and performed the terms and conditions of the contract of employment on

its part, and that the defendants had never paid the agreed commission of $10,000, or any part thereof.

Respondent David Whitcomb lives in Seattle, and was served in the action on November 25, 1913. Defendant Ernest M. Whitcomb lived in Amherst, Massachusetts, and was not in the state of Washington at the time the suit was begun, or at any time thereafter until he came as a witness for the trial in September, 1914. Consequently no service of process was made upon him in time for trial. Respondent David Whitcomb, having unsuccessfully demurred to the complaint upon the overruling of the demurrer, filed an answer denying all the allegations of the complaint except the nonpayment of the $10,000 or any part thereof. Upon the issues between appellant and respondent David Whitcomb, the cause was brought on for trial, defendant Ernest M. Whitcomb not appearing in the case by answer or otherwise. The verdict was for the respondent.

There are certain admitted or undisputed facts in the case which for a proper understanding of the controversy will be summarized as briefly as possible. The Arcade Building & Realty Company, a Washington corporation, which for convenience will be called the Arcade Company, owned a leasehold interest, having about ninety-two years to run, on a parcel of land in Seattle. There was a building owned by the Arcade Company upon this land. The capital stock of the company is $1,000,000. Three-fourths of the stock of the company, that is to say, 7,500 shares of the par value of $750,000, was owned by the estate of G. Henry Whitcomb, of Worcester, Massachusetts, father of the two defendants, who was then under incapacity, and his estate was under the management and control of two conservators, one of whom was Ernest M. Whitcomb. The other 2,500 shares of the Arcade Company, of the par value of $250,000, was owned by the A. W. Denny Company, a Washington corporation, which for convenience we shall call the Denny Company. The value of this one-fourth interest, or 2,500 shares of Arcade

stock, was estimated by the Denny Company at from $325,000 to $400,000.

In the spring of 1912, Henry C. Ewing, a member and agent of the appellant company, either at the instance of the Denny Company or on his own volition, began negotiations with David Whitcomb in Seattle for the sale of the 2,500 shares of the Arcade Company stock for cash. Several conversations were had between Ewing and David Whitcomb which resulted in nothing, but Ewing was informed by David Whitcomb that, as the proposition was a large one, Ewing would have to take the matter up with his brother, Ernest M. Whitcomb, and the estate in the east. About June, 1912, Ewing visited the east and had several personal conferences and considerable correspondence regarding the matter with Ernest M. Whitcomb. Negotiations progressed to such an extent that a preliminary or tentative agreement, as Ewing called it, was drawn up in the office of a lawyer in New York, setting forth the terms upon which Ernest M. Whitcomb signified his willingness to purchase the Arcade Company stock from the Denny Company. This agreement was not signed by either party, and it contained nothing as to the commission to be paid by the Whitcombs, or either of them, if the agreement was finally consummated by Ewing. As to the remainder of the details of the transaction between the parties and their subsequent transactions, the testimony is in sharp conflict. The jury having found in favor of the respondent, every intendment as to the truth of the facts asserted by respondent must be presumed, unless the verdict of the jury was illegally influenced by some error or misconduct on the part of the trial court or the respondent.

I. The court instructed the jury that:

"The fact that he [Ernest Whitcomb] has not appeared to answer this complaint, notwithstanding he has appeared as a witness in the case, is not to be considered by you as reflecting in any way upon his rights in this matter, as the law did not require him to file an answer in this case, and his

credibility is not to be affected simply by reason of the fact that he has not voluntarily appeared to file an answer to this complaint."

Thereafter, in arguing the case to the jury, one of counsel for appellant made the following statement:

"Of course, it is the law that Mr. Ernest Whitcomb did not have to appear in this suit until legal service was made upon him, but on the other hand, knowing of the suit he had a perfect right to appear whether he had been served or not, and it would seem that if he was certain of what took place between himself and Mr. Ewing at the Transportation Club in New York, he would be perfectly willing to appear and defend the suit and have it disposed of when he came out here to testify."

Whereupon counsel for respondent objected to that line of argument, and counsel for appellant, addressing the court, said:

"I said if Mr. Ernest Whitcomb felt sure of his position,—he had a perfect right to appear in this suit, and if he had been sure of his position, he no doubt would have availed himself of that right when he came across here as a witness."

Thereupon the court, addressing counsel and jury, said:

"The court has instructed the jury already that the fact that he has not appeared is not to be considered as reflecting upon his testimony at all, or not as prejudicing his rights in this case. Proceed."

Counsel for appellant then asked: "Do you instruct the jury that I cannot argue along that line?" To which the court replied, addressing counsel and jury:

"The fact that he does not appear to defend this case I have instructed the jury is not to be considered to his prejudice. Yes, I think he should not comment upon it."

This instruction and these rulings of the court upon the argument of counsel have been assigned as error by appellant. It is insisted with great vehemence that, by the ruling and instruction here complained of, the court not only for-

bade the jury to consider the action of the witness Ernest Whitcomb in connection with the case as bearing upon his credibility, but also forbade appellant's counsel to argue to the jury that his voluntary acts with reference to the case in which he was named as a party should be considered by them at all as affecting the weight to be given to his testimony. It is asserted that this instruction and these rulings took from the jury the right to decide upon the veracity and credibility of Ernest Whitcomb as a witness, notwithstanding the fact that he had traveled 6,000 miles to appear as a witness for the codefendant, his brother, though still exercising his lawful right not to appear in the case until legally served; and that, furthermore, the interruption of the argument and the ruling of the court amounted to an indorsement by the court of Ernest Whitcomb, selecting him and giving him a standing different from that of Ewing and other witnesses; that he was held up to the jury as entirely credible and free from attack, while Ewing was, by general instructions, declared an interested witness.

A large number of cases are cited by appellant to the effect (which has never been doubted in this state) that the courts should not comment upon the evidence in the case or point out a witness or a class of witnesses as being more or less entitled to credit than others, and that a jury should not be instructed that they must or must not find the credit and credibility of a witness or a class of witnesses in a certain way; none of which cases seems to us to be in point. For instance, *Jones v. Casler*, 139 Ind. 382, 38 N. E. 812, 47 Am. St. 274, is cited to the effect that the weight to be given to the testimony of one witness or class of witnesses is always a question for the jury, and that it is never proper to charge a jury, as a matter of law, that any witness or class of witnesses shall be received with greater consideration than any other. This proposition cannot be doubted and never has been gainsaid in this state with any degree of success. *Bradley v. Gorham*, 77 Conn. 211, 58 Atl. 698, 66 L. R. A. 934,

has been cited to the effect that, where the trial court instructed the jury that, if there was no evidence impeaching a witness, his testimony was entitled to full credit and belief, the instruction was erroneous; that the jury were not, as a matter of law, bound to regard what he had said as entitled to full credit and belief; they were to consider all the evidence in the case. But no such instruction was given in this case. *People v. Wallace*, 89 Cal. 158, 26 Pac. 650, is cited to the effect that the trial court erred in instructing the jury that no inference unfavorable to the credibility of witnesses should be drawn from the fact that they were engaged in a lawful undertaking, that of theaters selling liquor, such business being then privileged in that state. It is an undeniable rule, as stated in *DeLong v. Giles*, 11 Ill. App. 33, cited by appellant, that it is the province of the jury to take into consideration all the facts appearing from the evidence that in their judgment throw light upon the question, which may include the pursuit the witness follows as a business; but that these, or any of them, while tending to discredit him, may not operate to that extent, and the right, with the responsibility of determining upon such consideration alone whether it does or does not, must rest wholly with the jury. *Gilmore v. Seattle & Renton R. Co.*, 29 Wash. 150, 69 Pac. 743, and *State v. Jackson*, 83 Wash. 514, 145 Pac. 470, are cited as sustaining appellant's contention. In the *Gilmore* case, it was said:

"The court cannot, without invading the province of the jury, instruct them which class of evidence is entitled to the greater weight, or instruct them in any manner which will not leave them free to make up their verdict from their own views on the weight of the evidence. Nor is such an instruction rendered harmless by an instruction to the effect that the jury are the sole judges of the credibility of the witnesses and of the weight of the evidence, as it gives them a wrong rule of law for determining that weight and credibility."

But that language is not referable to any such situation as is here presented. In *State v. Jackson, supra*, there were

remarks and comments by the trial court upon certain books of account and other documentary evidence, positively indicating the views of the court as to the weight of the testimony of one of the parties. A large number of other decisions of this court are cited to the effect that the credibility of witnesses is exclusively a matter for the jury, along whatever line the jury sees fit to reason out the matter; together with a long list of authorities from other states.

We cannot agree with the contention of appellant that the instructions and rulings here complained of were erroneous and prejudicial, in that they single out the witness Ernest Whitcomb and give special directions regarding his credibility in such a way as to give him a special standing before the jury. He appeared upon the complaint as a party to the case, but it was admitted that he had not been legally served and had made no appearance in the case. It was necessary for the court to instruct the jury that they could render no verdict against Ernest Whitcomb. We think it a correct proposition that the fact that Ernest Whitcomb had not appeared to answer the complaint before it was necessary for him to do so, although he had appeared as a witness in the case, was not to be considered as reflecting upon his rights in the controversy or upon his credibility as a witness. He had a legal right to decline to enter his appearance in the case before he was legally served, and to decline to be bound by any judgment that might be rendered against his codefendant, David Whitcomb. He was under no duty to employ expensive counsel to defend him in a case until he had been properly made a party to the case. Mere nonappearance in the case, therefore, was not a circumstance to be considered as affecting his credibility as a witness. There were other circumstances to be considered, upon which counsel for appellant laid no stress and to which they apparently paid no attention. These facts were that he was a brother of David Whitcomb; a nominal party defendant; a party charged by the plaintiff with being interested in the

result of the litigation, and one who had traveled a very great distance to appear as a witness to testify in the case in behalf of his brother and codefendant. All these were matters proper to be considered by the jury in considering the interest, bias, and credibility of Ernest Whitcomb as a witness. As to these matters, the court properly instructed the jury as follows:

"The question of the credibility of the witnesses is a matter for the jury to pass upon, where they do not agree in their testimony, and in considering the testimony of witnesses you would have regard to their bearing and demeanor on the witness stand as indicating frankness and fairness on their part; you would take into consideration the interest of the witnesses in the result of the litigation, as tending to color or bias the testimony. The testimony of a witness is not to be disregarded because he may be interested in the result of the litigation, but human nature is so constituted that the judgment of most of us is apt to be colored by our self-interest, and that is a characteristic of human nature for the jury to consider in passing upon the credibility of witnesses."

This direction properly applied impartially to the parties on both sides. The court in its instructions further repeatedly instructed the jury that they were the sole and exclusive judges of the facts. The argument of counsel, that the mere nonappearance of Ernest Whitcomb as a party defendant in the case was a circumstance to be considered by the jury in judging of his credibility as a witness, was improper argument and was properly restrained by the court, for the reason that such argument invited the jury to draw an improper inference from the nonappearance of a witness as a defendant in the case, as to which he had an absolute legal right. Such improper inferences should always be restrained when necessary. *Klepsch v. Donald*, 8 Wash. 162, 35 Pac. 621; *Knowles v. People*, 15 Mich. 408; *Ludlow v. Pearl's Estate*, 55 Mich. 312, 21 N. W. 315.

II. Appellant's second contention is that it was erroneous for the court to instruct the jury that there was no

evidence of partnership in this case between the two Whitcomb defendants, and that the jury cannot find David Whitcomb liable on the contract made by Ernest Whitcomb, unless David expressly authorized the contract or thereafter ratified it. It is urged that the existence of a partnership, like any other fact, may be proved, not only by direct testimony, but by facts and circumstances; the word "partnership" is not required, nor written articles therefor. This is no doubt true. The question here, however, is simply one of fact. As to the agreement between Ernest Whitcomb and appellant for the payment of a commission, if any agreement was made, it was oral, and the written memorandum indicative of the tentative terms of the purchase and sale of the Arcade Company's stock from the Denny Company was only incidental thereto.

It is insisted by appellant that, because David Whitcomb had referred Ewing to Ernest Whitcomb, and Ewing had negotiated a preliminary agreement with Ernest Whitcomb in which, as he alleged and testified, Ernest Whitcomb had agreed that, if the purchase of the stock was consummated upon the terms stated he would pay a commission of $10,000, therefore David Whitcomb is bound by the agreement made by Ernest Whitcomb. The only witness as to this fact on the part of appellant is Mr. Ewing. His version of the transactions between himself and Ernest Whitcomb is disputed in some very important particulars by Ernest Whitcomb, who is supported in some slight degree by the testimony of the lawyer in New York City to whom they went to draw the tentative agreement. There was positively no direct testimony on the part of either of the parties that a partnership existed between the two Whitcombs. There is an allegation and theory on the part of appellant that the two Whitcombs were associated together in a joint business enterprise in the transactions herein involved and were and are partners for the purpose of these transactions. The two vital questions of fact in the case for the decision of the jury,

therefore, were, (1) Did the defendant Ernest Whitcomb, in the negotiation with Ewing at New York on June 28, 1912, promise Ewing a commission of $10,000 if he would procure the acceptance by the Denny Company of the Whitcomb proposition embodied in the written memorandum? and (2) If such promise was made, was defendant David Whitcomb bound by it as a joint proposition from himself and Ernest, as partners or otherwise?

The rules of law as to general partnerships are well understood to be much broader and more comprehensive to the effect that any act or representation done or made by one partner with reference to any of the partnership business will bind the other partners, than the rule applicable to a special or limited partnership or a mere joint venture. If the theory of appellant in this case be true, that both of the Whitcombs were interested in the purchase of the Arcade Company stock, it nevertheless does not necessarily follow that they were equally interested, or that they were jointly interested, or that they agreed or intended to take over the Arcade Company's stock as partners. Assuming that it was their intention to purchase the Arcade Company's stock as indicated by the transactions had between them and Ewing, it may also well be assumed that each of them would take his individual share according to his interest or ability. The court merely instructed the jury (which was the truth) that there was no evidence of a partnership between the two Whitcombs; that the agreement made by one would not be binding upon the other without his consent, and that the liability of David Whitcomb, who was the sole defendant on trial in this cause, can only be established by such evidence as would be sufficient to establish it between parties not partners, viz., by evidence showing prior authorization or subsequent ratification. There is no contention on the part of appellant that David Whitcomb, prior to the departure of Mr. Ewing for the east to consult with Ernest Whitcomb, made any agreement or authorized any agreement, or that

he ever afterwards ratified any agreement, that he or they would pay or be liable for the payment of any commission whatever for the purchase of the Arcade Company stock. The only evidence there is of any such agreement is the evidence of Mr. Ewing of his agreement with Ernest Whitcomb; and Ernest Whitcomb does not deny, but admits, that he agreed that, if the purchase was made as contemplated, he would pay a commission of $10,000, or see that it was paid. Ernest Whitcomb also further testified that this agreement, so far as David Whitcomb was concerned, was subject to his approval, and upon these controverted facts the case went to the jury. It is not a case where, as in *Nicholson v. Kilbury*, 83 Wash. 196, 145 Pac. 189, or *Galbraith v. Devlin*, 85 Wash. 482, 148 Pac. 589, and many other cases from this and other courts, the parties charged with a partnership had in fact acted in a joint or common interest, and so established the fact that they were partners *inter se* although not calling themselves partners. The facts as to this issue were properly submitted to the jury under proper instructions, which instructions were as fair to the appellant as could be desired.

III. The third proposition of appellant is that the court erred in instructing the jury that a broker engages to obtain for his employer the contract which he was authorized to submit, whereas the law is that it is no part of his duty or right to obtain such contract.

This instruction is complained of for two reasons: First, because it speaks of the refusal of the employer of the broker to carry out the contract, with the implication that a positive refusal is necessary in order to entitle the broker to his commission, whereas the nonaction of the employer of the broker is just as effective; and, secondly, because it tells the jury that the broker engages to obtain for his employer the contract which he was authorized to submit. It must be remembered, however, that the basis of appellant's recovery is an agreement to do a certain thing for a certain sum. In

other words, the right and amount of its recovery are measured by its contract. If it agreed to do a certain thing, it was necessary that it do that thing before it could recover for its services. Upon this subject the court instructed the jury quite fully and comprehensively. It, by its instructions, directed the jury's attention to the fact that the appellant claimed that, in consideration of its services in bringing about a sale from the Denny Company of the 2,500 shares of stock in accordance with the written proposition, it was entitled to the sum of $10,000; that it would become entitled to this compensation whenever it should succeed in obtaining from the Denny Company its consent to sell this stock in accordance with the terms of the written proposition, and provided that the Denny Company was, at the time of such consent or within a reasonable time thereafter, ready, willing, and not only ready and willing but able, to close the contract in accordance with the terms of the written proposition. The attention of the jury was further directed to the claim of the appellant that it had performed its part of the agreement, that the Denny Company had signified its consent to the terms of the written proposition, that it was ready, able, and willing to carry out the terms of that proposition of purchase, and that, therefore, the appellant was entitled to the compensation agreed upon. The court then instructed the jury that:

"The compensation of a broker, as a general rule, is not dependent upon the actual consummation of the contract between the parties for whom he acts as middleman. If the employer of a broker should refuse to carry out the contract which he employed the broker to obtain for him, the broker is nevertheless entitled to his commission, because that is all he engages to do. He engages to obtain for his employer the contract which he was authorized to submit; and where the employer claims that the broker was not only to find somebody willing to enter into the contract submitted to the broker, but was not to receive any compensation unless his employer should actually conclude the transaction and enter

into the contract with the other party, there must be evidence that such was the condition before the broker would be deprived of his right to compensation. If from a preponderance of the evidence in this case you should be satisfied that the defendant David Whitcomb, either by himself or through his brother, or by the adoption of a contract made by his brother with the plaintiff, employed the plaintiff to negotiate the purchase from the A. W. Denny Company of the 2,500 shares of stock referred to in this written proposition, and if the plaintiff was so employed to bring about, in behalf of the defendant, the sale of this stock upon the terms and conditions set forth in this written proposition, as claimed by the plaintiff, and if you should further find from the evidence that the plaintiff did induce the A. W. Denny Company, the owner of these 2,500 shares of stock, to consent to this written proposition, and to agree to sell these shares of stock to the defendants upon the terms set forth in this written proposition, and if you further find from the evidence that the A. W. Denny Company was ready, willing and able to carry out such a contract on its part, and if you further find that the defendant David Whitcomb, through himself or his brother acting under his authority, agreed to pay the plaintiff the sum of $10,000 in event he should obtain from the Denny Company their consent to enter into such a contract as is set out in this written proposition, and if you find, as I say, that the Denny Company was ready, able and willing to carry out such a contract, then your verdict would be for the plaintiff against the defendant David Whitcomb in the sum of $10,000."

These instructions, therefore, taken as a whole, we think, comprehensively set forth the law applying to the agreement under consideration very fully and very fairly to the appellant. We can see no error in this assignment.

IV. The court instructed the jury as follows:

"If you should find from the evidence that the defendant Ernest Whitcomb was a conservator of the estate of his father, and that the estate of his father owned a portion of the common stock of the Arcade Building & Realty Company, which under this written proposition would have to be converted into preferred stock of the Arcade Building & Realty Company, and if you should find that Ernest Whit-

comb, in making such a contract with the plaintiff, if he did make it, was taking advantage of his trust position as conservator of the estate of his father for his personal benefit, then such a contract would be against public policy and would not be recognized by the law, and the law would not enforce it at the instance of Ernest Whitcomb, or would not enforce it against him."

An exception was taken to this instruction. It is insisted by appellant that the law is well settled that a broker is entitled to his commission for procuring a purchaser even though there be some illegality in the transaction to be consummated between the buyer and seller, where the broker does not actively participate in the illegality, citing a number of cases. It is further asserted that the law always presumes honesty of action and intent unless the contrary affirmatively appears. These statements of the law were given in substance by the court in the remainder of the instruction complained of under this head. That remainder is as follows:

"If there appears in the case any claim that there was anything in connection with the carrying out of the written memorandum which would have involved any fraudulent or unlawful act, there are two principles of law to be remembered in this connection. One is that the law always presumes that a contract is to be carried out lawfully if a lawful performance is possible, and therefore will not adjudge a contract unlawful unless its performance necessarily involves an illegal or fraudulent act, or the evidence shows that an illegal or fraudulent act was intended, the presumption being in favor of the lawfulness and *bona fides* of contracts and transactions. The other principle is that a broker employed as a middleman between two parties and who renders the agreed service is entitled to his commission even though the parties to the main transaction, or either of them, contemplate a violation of the law or the commission of a fraud, unless the broker or middleman knowingly participated in some way in the illegality or fraud."

It seems to us, therefore, that the court instructed the jury fully in line with appellant's theory, and that the appellant has no right to complain of the instructions. It must further

be observed that the testimony of the parties conflicted as to details of the agreement arrived at in New York. The version of Ernest Whitcomb was that it was dependent upon that very fact of the conservators of the estate of G. Henry Whitcomb receiving the consent of the probate court of Massachusetts to enter into the transaction of converting the stock held by them as conservators for G. Henry Whitcomb into the kind of stock contemplated by the written memorandum. The court, therefore, was simply giving to the jury the versions of the respective parties to the contract, and instructing them upon this question much more strongly in favor of appellant than of respondent. We see no reason for complaint of the instructions as a whole.

V. Appellant's fifth proposition of error is based upon an instruction of the court to the effect that, in passing upon the facts in this case, where the jury are unable to decide as to the superior credibility of the witnesses as to the weight of the positive proof, they must determine from a consideration of the whole case the circumstances and inferences that may fairly be drawn from the evidence as to the probability of the truth of the claim of plaintiff and as to the truth of the claim of the defendant. They were then told that, if, in carrying out the alleged contract between defendant and the Denny Company as proposed, there were difficulties to be overcome and that before the contract could be executed by the parties it would be necessary to obtain the consent of the probate court of Massachusetts to the conversion of the stock of G. Henry Whitcomb into preferred stock, these were matters which the jury might consider in passing upon the probability of such a contract having been made by the defendants—the probability of their having agreed to pay plaintiff $10,000 after having obtained the consent of the Denny Company to enter into such contract and before the contract was actually closed between the parties by the overcoming of whatever difficulties may have been in the way; and in passing upon the probability of the truth of the claim of the plaintiff that it was

to receive $10,000 for the services in inducing the Denny Company to enter into any such proposed contract, the jury should consider whether it was probable that appellant would render the services which the jury might find appellant to have rendered if it was only to be compensated in the event the parties to the proposed contract should actually consummate it.

Appellant contends that this instruction singles out the circumstances claimed by respondent to tend strongly to prove his contention on the facts, and amounted to an argument on the part of the court in favor of respondent. It does not so seem to us. It would seem to us that this instruction also was much more favorable to appellant than to respondent. It drew the attention of the jury to the probability of the difficulties in the way of procuring the consent of the Denny Company to the particular terms demanded by respondent, if made, and of procuring the consent of the probate court of Massachusetts to the conversion of the stock of G. Henry Whitcomb into preferred stock, as bearing upon the probability of defendant agreeing to pay plaintiff a commission of $10,000. It is true it takes cognizance of the theories of both parties to the case, as is always proper where the theories of both parties find any justification in the law. The jury were further told in this instruction that they were to consider the probability of the truth of the claim of plaintiff that it should receive $10,000 for its services in inducing the Denny Company to enter into the proposed contract, whether or not it would have rendered such services as the jury might find it had rendered through Ewing, and going to the expense that it had gone, if it was only to be compensated in event the parties to the proposed contract should actually consummate it and carry it out. In most cases where the evidence is in sharp conflict and is close, it is advisable for the trial court to direct the jury's attention to the probabilities of the case and to the circumstances and inferences surrounding the parties in the case, in order that

they may properly weigh the evidence of the parties and in a way put themselves in the position of one or the other of the parties and determine the truth of the matter. It has always been held proper for the court to instruct the jury to consider the probabilities of the truth of the evidence. While this instruction calls attention to the particular features of the case and to the particular phases to be determined as to the probability or improbability of their truth, we cannot say that it is an unfair comment upon the evidence such as is prohibited by our constitution, or an argument in favor of either the one or the other of the parties, unless it be in favor of the appellant.

VI. It is alleged that the court erred in giving the following instruction:

"Unless the minds of both parties actually meet in a present agreement there is no contract. And I instruct you, therefore, that, unless you find from the evidence that the negotiations between the parties in this case did result in an actual present agreement as distinguished from a proposed proposition to be considered in the future, you must find a verdict for the defendant."

It is insisted that this instruction was erroneous and misleading, in that it confused the meeting of minds upon the broker's contract of employment with the meeting of minds upon the purchase and sale of the stock; that, under the evidence, the jury could not fail to be misled by this instruction. It is true that the agreement for the broker's employment was in a way separate from the proposed contract for the purchase and sale of the stock, but it was dependent upon it. The purchase and sale of the stock upon certain terms was a part of the broker's contract of employment. There was no dispute, and could be no dispute, as to what the terms of the proposed purchase and sale of the stock were. They were set forth in the written memordanum. But even that was not an executed agreement. It was unexecuted, both in its form and in its performance. It was a proposed agreement.

It was spoken of by Mr. Ewing in one of his letters as a tentative agreement. He was employed, as he alleges, to bring about the consummation of that agreement, and he says that it was agreed that, if he did bring it about, he was to receive $10,000. Again, however, the instruction excepted to is not the whole of the instruction upon that subject. That part of the instruction excepted to was preceded by the following instruction given by the court:

"The contract which plaintiff claims was made by the defendants, to pay the plaintiff a commission, was made, if at all, orally in conversation between the parties and was not reduced to writing. The court instructs you in order for there to be a contract the minds of the parties must meet; that is to say, they must reach an actual present agreement to which they both in fact agreed to be then bound. It is not sufficient that they come to an understanding as to the terms of a contract which either one or both parties may be willing to enter into in the future after further consideration, nor is it even sufficient that one of them intends or understands that the arrangement is intended to be binding at that time."

It, therefore, seems clear that the instruction complained of, taken in its entire setting, is an instruction referring to the identical oral contract of employment alleged between appellant and respondent. It certainly is the law that a party to a contract cannot recover until his contract is performed, or, in other words, until his right of action has accrued. It certainly was correct for the court to instruct the jury that "unless you find from the evidence that the negotiations between the parties in this case did result in an actual present agreement," the understanding of one party alone would not make a contract. Here, again, there is a controversy between the chief witnesses to the transaction, Mr. Ewing and Mr. Ernest Whitcomb, as to whether a present binding contract was then made. There is testimony on the part of Ernest Whitcomb and the lawyer in New York who drew the written memorandum, who were the only ones present beside Mr. Ewing, to the effect that Mr. Ewing insisted

upon some kind of writing being given to him as a basis of a future negotiation which Mr. Ewing desired to conduct with investors or financial people in order to finance the sale of the proposed preferred stock for the Denny Company. In other words, Mr. Ewing testified that certain things were said to constitute the agreement, while Mr. Whitcomb and the lawyer testified that the conversation was different. It was within the province of the jury to believe either version, or to believe part of one and part of the other, and it was possible for them to arrive at the conclusion that the conversation that actually occurred did not make clear that the minds of the parties had then met in a present agreement. It was purely a question of fact to be submitted to the jury, and we think the instruction as a whole properly submitted it. We find no prejudicial error.

We think the case was properly presented to the jury upon the issues between appellant and David Whitcomb. It may be reasonably inferred that the issues of fact were resolved by the jury in favor of respondent David Whitcomb upon the theory that he was not a partner of Ernest Whitcomb in the transaction involved, and did not authorize or ratify the agreement for the payment of the sum claimed for the brokerage services. We do not understand that the issues of fact as decided in this case are conclusive in any subsequent trial between the defendant Ernest Whitcomb and appellant. We express no opinion, however, as to the probability of the liability of Ernest Whitcomb for the payment of the commission under facts here shown.

The judgment is affirmed.

Parker, Main, and Fullerton, JJ., concur.

Morris, C. J. (dissenting)—I dissent. The court, by its ruling and instructions, made the credibility of the witness Ernest M. Whitcomb a question of law rather than one of fact for the jury. In considering such credibility and the weight to be given to the testimony of this witness, the jury

had the right to consider any fact which in their judgment affected such credibility or weight. Being a question for the jury, counsel was within his rights in commenting as he did when stopped by the court.

[No. 12887. Department Two. March 7, 1916.]

FRED E. DUVAL, *Respondent*, v. INLAND NAVIGATION COMPANY *et al.*, *Appellants*.[1]

CARRIERS—CARRIAGE OF PASSENGERS—TERMINATION OF RELATION—EJECTION—LIABILITY. Where a passenger remains on a boat for thirty or forty minutes after it arrives at his destination, for the reason that his wife was away and there "was no use to go home," and to talk to a man, he ceases to be a passenger, and liability for his ejection would depend upon whether he was wilfully or wantonly assaulted or whether more force was used than was reasonably necessary.

SAME — EJECTING PASSENGER — TORT OF EMPLOYER — DEFENSES—AIDING OFFICER. Under Rem. & Bal. Code, § 2365, making it the duty of every person to aid an officer in arresting any person if commanded so to do, the owner of a boat is not liable for the acts of the purser in ejecting a person from the boat, if the purser was acting under the direct command of a police officer and aiding him to make an arrest.

TRIAL—MISCONDUCT OF COUNSEL—INSTRUCTIONS. In an action for personal injuries and false arrest and imprisonment, the opening statement, and the persistently asking of questions, bringing before the jury the irrelevant fact that one of the defendants was arrested and convicted of making an assault upon the plaintiff, may easily be so highly prejudicial as not to be curable by instructions.

FALSE IMPRISONMENT—MALICIOUS PROSECUTION—EVIDENCE—NEWSPAPER ACCOUNTS—ADMISSIBILITY. In an action for false arrest and imprisonment, it is reversible error to admit in evidence newspaper articles relative to the arrest which contain matters other than may be ascertained from the charge against plaintiff and the proceedings had thereon, where the defendants were in no way responsible for the publications.

[1]Reported in 155 Pac. 768.

Appeal from a judgment of the superior court for Whatcom county, Pemberton, J., entered September 25, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

Bronson, Robinson & Jones and *Chas. A. Sather*, for appellants.

W. P. Brown and *C. A. Swartz*, for respondent.

MAIN, J.—The purpose of this action was to recover damages for personal injuries, and for false arrest and imprisonment. The defendants are Inland Navigation Company, owner of the steamship "Kulshan," and G. W. Rimer, the purser upon that vessel.

In the complaint there are two causes of action separately stated, one for personal injuries, and the other for wrongful arrest. After the issues were framed, the cause in due time was tried to the court and a jury. A verdict was returned in favor of the plaintiff in the sum of $750. Motion for a new trial being made and overruled, a judgment was entered upon the verdict. From this judgment the defendants appeal.

Inasmuch as there must be another trial of this cause, the facts will be only briefly stated, and without comment. On the evening of November 10, 1913, the respondent, at Seattle, Washington, became a passenger on the steamship "Kulshan," intending to go to the city of Bellingham, which was one of the termini of the steamship's route. After getting aboard the vessel, he occupied a stateroom until about 6:30 the following morning, when he arose and went to the men's smoking room, which was in the bow of the boat below. When the boat called at Anacortes that morning, one Charles P. Bauer came aboard for the purpose of going to Bellingham. The respondent and Bauer had not previously been acquainted, but engaged in conversation in the swoking room until the boat arrived at the dock in Bellingham, and for some thirty or forty minutes thereafter. There were in the smoking

room some eight or ten other passengers, two of whom were somewhat intoxicated. There was a bar in or adjacent to the smoking room, with one Kelly as bartender.

When the boat arrived at the Bellingham dock, all the passengers upon the boat, including those in the smoking room, with the exception of the four mentioned, left the boat. The time which it took for the passengers to disembark consumed approximately four or five minutes. After the four which remained in the smoking room had been there for a period of thirty or forty minutes, they were forcibly ejected therefrom; the respondent and Bauer in charge of the purser, and the other two in charge of a police officer who was in the employ of the Citizens' Dock Company. As to whether the four had been invited to leave and had a reasonable opportunity to do so prior to the ejectment, the evidence is conflicting. After their ejectment they were taken by the police officer to the station, where charges were filed against each of them, and they were imprisoned for a few hours. Upon a hearing, the respondent and Bauer were, by the justice, discharged. Thereafter the respondent caused the arrest of the pursuer, Rimer, upon the charge of assault in the third degree. The present action was brought for the purposes above indicated.

It is claimed by the appellants that, at the time of his ejectment from the boat, the respondent had ceased to be a passenger, and that no duty was owing to him as such. The respondent claims that the relation of carrier and passenger continued until he had notice to leave the boat. The rule is that the relation of passenger and carrier ceases when the passenger is made aware of the arrival at the place of destination, and has had reasonable time to get off the boat or train. *Imhoff v. Chicago & M. R. Co.*, 20 Wis. *344, 362; *Georgia & F. R. Co. v. Thigpen*, 141 Ga. 90, 80 S. E. 626; *Chicago, K. & W. R. Co. v. Frazer*, 55 Kan. 582, 40 Pac. 923.

In 2 Hutchinson, Carriers (3d ed.), § 1016, the rule is stated thus:

"As a general rule, it may be said that the relation of carrier and passenger does not cease with the arrival of the train at the passenger's destination, but continues until the passenger has had a reasonable time and opportunity to safely alight from the train at the place provided by the carrier for the discharge of passengers, and to leave the carrier's premises in the customary manner."

If the passenger remains upon the train or boat of the carrier an unreasonable time after reaching his destination, and after being afforded a reasonable opportunity to alight, he is no longer a passenger. In 4 R. C. L., p. 1043, § 497, it is said:

"As a general rule, however, one who remains on the carrier an unreasonable length of time after reaching his destination, and being afforded a safe opportunity to alight, is no longer a passenger."

In *Chicago, K. & W. R. Co. v. Frazer, supra*, it is said:

"When he had been safely carried to his destination, and to a point which was then the end of the road, and had been afforded almost half an hour to leave the train, the company no longer owed him any duty as a passenger, nor was it under any obligation to him as such."

In this case, from the respondent's testimony, it appears that he remained upon the boat, not because he did not know that it had landed, but because his wife was at Ferndale, and "there was no use to go home," and that he remained on the boat about thirty minutes for the reason stated, and for the further reason that he wanted to talk to Bauer. It is obvious that the respondent had ceased to be a passenger at the time he was ejected, and the jury should have been so instructed. The relation of passenger and carrier having ceased, the respondent became in effect a trespasser, and liability could only be predicated upon the manner of his removal. If he was wilfully or wantonly assaulted, and more force was used in accomplishing his ejectment than was reasonably neces-

sary, he had a cause of action. *Houston & T. C. R. Co. v. Cohn*, 22 Tex. Civ. App. 11, 53 S. W. 698; *Fanning v. St. Louis Southwestern R. Co.*, 38 Tex. Civ. App. 513, 86 S. W. 354.

It is true that, in the cases cited, the carrier was a railway company; but the principle must be the same when it is applied to a carrier by water. What may be the exact formula of the rule relative to the duty of a carrier to call out the stations so that a passenger may have an opportunity to know that the place of his destination has been arrived at, it is not necessary here to inquire. The respondent knew that the boat had docked at Bellingham and that the other passengers had departed from the boat. He remained aboard for a period of thirty or forty minutes for purposes of his own.

Upon the question whether the purser in ejecting the respondent and his companion from the boat was acting in his capacity as an officer of the vessel, or was acting under the command of the police officer, Dodd, the evidence is conflicting. Under Rem. & Bal. Code, § 2365 (P. C. 135 § 225), it is the duty of every person, after having been lawfully commanded so to do, "to aid an officer in arresting any person, or in retaking any person who has escaped from lawful custody, or in executing any lawful process." Neglect or refusal to perform this duty in aid of the officer constitutes a misdemeanor. The court, in submitting this question to the jury, doubtless through inadvertence, left out of the instruction one clause which appears in the statute, thereby changing the meaning somewhat, and making the instruction hardly applicable to the facts in the case. If the purser was acting under the direct command of the police officer, and not as an officer of the boat, his conduct, whatever it may have been in the manner of the ejectment, would not render the owner of the vessel liable.

During the opening statement to the jury, counsel for the plaintiff stated, over the objection of the appellants, that the respondent had caused Rimer, the purser, to be arrested for

the crime of assault in the third degree, and that he was tried before Judge Beach, a justice of the peace, and found to be guilty. During the course of the trial, the respondent sought to show the arrest and conviction of Rimer. This was objected to, and the objection was sustained. Subsequently, when Judge Beach was upon the stand, the matter was again inquired into, and the objection to the question sustained. Counsel for the respondent persisted in asking the questions upon the pretense that he desired to make a record, thus forcing the other side to object. When objection was made to the opening statement, the court stated to the jury that the statement was not evidence, and that it was only what counsel expected to prove. When the objectionable questions were asked, the jury were told not to consider the statements of counsel unless supported by the testimony in the case. And in the formal charge to the jury, they were told to consider the case solely upon the evidence which the court had admitted.

Rimer's arrest and conviction was totally irrelevant to any issue in the case. As we understand the respondent's brief, it is not claimed that it was relevant or material. But it is claimed that whatever error may have been committed in the opening statement, and in the questions asked, was cured by the court's instructions. Whether the error was cured, it is not necessary here to determine, as upon a retrial the error will doubtless not occur. It may be said, however, that in bringing before the jury in an opening statement facts which are entirely irrelevant to the issues to be tried, and deliberately interrogating witnesses concerning a matter which has no bearing upon the issues, may easily be so highly prejudicial as not to be curable by instructions.

After the plaintiff was arrested, there appeared in the Bellingham Herald, a newspaper published at Bellingham, in the issue of November 11, an article relative to the arrest, and the cause thereof. In an issue of the same paper of November 12, there appeared another article. These newspaper

articles in their entirety were admitted upon the trial over the objection of the appellants. The articles contained more than could be ascertained from the complaint charging the offense, and the proceedings had thereon. There is no evidence that the appellants were responsible for either of these publications, except in so far as they state facts which could be ascertained from the arrest and trial. In actions for malicious prosecution or false arrest, a newspaper article may be admitted for the purpose of showing the fact of publicity given to the charge. But if the article contains matters other than may be gleaned from the charge and the proceeding thereon, it is not admissible, in the absence of a showing that the defendant in the action was responsible in some degree for its publication.

In *Baer v. Chambers*, 67 Wash. 357, 121 Pac. 843, Ann. Cas. 1913 D. 559, upon a similar question this court said:

"Now in the case before us, there is no evidence indicating that appellant was responsible for any of these publications, save in so far as they stated facts which could be ascertained from the complaint made before the justice charging the respondent with the crime, the warrant of arrest, and his arrest thereunder. In view of these facts, anything else contained in these publications, we think, would be irrelevant, though such additional matters might possibly be rendered relevant if shown to have been published at appellant's instance."

If newspaper articles be so framed that they cannot be read without introducing objectionable matter, they must be excluded. But it is competent to have it appear before the jury that the fact of the arrest was published in the paper. In *Fletcher v. Chicago & N. W. R. Co.*, 109 Mich. 363, 67 N. W. 330, it is said:

"So far as this article stated the fact of the arrest, it was admissible, under the authorities; but, in so far as it stated what the company proposed to do, it was clearly incompetent. There was nothing to show that the article was prompted by the company, or by an agent thereof. It may have furnished

the entire reason for the jury to find that Mr. Houle was authorized by the company to make the complaint. If such article be so framed that it cannot be read without introducing the objectionable matter, it must be excluded; but it would be competent to have it appear before the jury that the fact of his arrest was published in the paper."

The introduction in evidence of these newspaper articles was prejudicial error.

The judgment will be reversed, and the cause remanded with direction to grant a new trial.

MORRIS, C. J., PARKER, BAUSMAN, and HOLCOMB, JJ., concur.

[No. 12954. Department Two. March 7, 1916.]

ABE GREENBAUM, *Respondent*, v. LEOPOLD M. STERN, *Appellant*.[1]

EVIDENCE—DECLARATIONS BY THIRD PERSON—ADMISSIONS AGAINST INTEREST. In an action on a promise to pay the debt of plaintiff's brother, pursuant to a tri-party agreement under which plaintiff shipped certain goods to defendant, extra judicial statements of the brother to the effect that no such agreement was made are admissible as declarations against interest by one having a common interest with plaintiff, since the brother would have benefited by defendant's performance.

CONTRACTS—ACTIONS—EVIDENCE—ADMISSIBILITY. In such a case evidence that, after the defendant had received and sold the goods, which belonged to the brother, he paid a creditor of the brother, pursuant to an agreement under which the goods were shipped to him, is admissible as tending to prove that the contract claimed by the plaintiff was never made.

FRAUDS, STATUTE OF—PROMISE TO PAY DEBT OF ANOTHER—ORIGINAL PROMISE. An oral agreement between plaintiff, his brother, and defendant whereby plaintiff agreed to ship to defendant certain goods belonging to the brother in consideration of defendant's agreeing to pay the brother's debt to plaintiff, is an original promise based upon a sufficient consideration, and hence not within the statute of frauds relating to a promise to pay the debt of another.

[1]Reported in 155 Pac. 751.

Appeal from a judgment of the superior court for King county, Frater, J., entered January 25, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

Edward Judd, for appellant.

Aust & Terhune, for respondent.

PARKER, J.—The plaintiff, Abe Greenbaum, seeks recovery from the defendant, Leopold M. Stern, upon an alleged promise made by the defendant to the plaintiff to pay a debt due plaintiff from his brother, Albert Greenbaum, the promise being a part of a verbal contract to which all three were parties. Trial before the court and a jury resulted in a verdict and judgment in favor of the plaintiff, from which the defendant has appealed.

Respondent's version of the making of the contract, its terms and the attending circumstances, is, in substance, as follows: In December, 1911, respondent was the manager in charge of two stores belonging to his brother Albert, one of which was at Anacortes and the other at Sedro Woolley. Respondent resided at Anacortes, but visited the store at Sedro Woolley about every other day. His brother Albert and appellant were residents of Seattle. Albert was then indebted to respondent in the sum of $1,140 on account of money loaned. About December 14, 1911, Albert and appellant, the latter being then Albert's lawyer, as he informed respondent, came to the store at Anacortes with a view of having respondent ship or deliver to appellant a large quantity of goods to be taken from the stores. This intention being made known to respondent, he declined to ship any of the goods or deliver them to appellant until his debt of $1,140 due him from Albert was paid or secured. Respondent testified upon this subject as follows:

"I told him [Albert] I would not do it; that he owed me $1,140 and no goods would go out until I got my money as

it was hard-earned money. This was in the presence of Stern."

It was thereupon agreed between Albert, appellant and respondent that the goods should be shipped or delivered to appellant, and that he would assume and pay to respondent the debt owing from Albert. Thereafter, in pursuance of this agreement, respondent shipped to appellant, at Seattle, a quantity of the goods, of the wholesale value of some $2,300, where they were received by appellant in due course. Shortly thereafter an equal or greater quantity of goods was taken from the stores and delivered to appellant and taken away by him as baggage. Appellant, in each instance, aided in selecting the goods, and was given the privilege of exercising his choice in making the selection. This version of respondent is corroborated to a large extent by other witnesses who were present. It is not plain that respondent then knew just what appellant was going to do with the goods, or the exact nature of the interest appellant thereby acquired in the goods.

Appellant's version of the matter is that he was not a party to any such agreement as testified to by respondent; that he was not at Anacortes or Sedro Woolley at any time in December, 1911, and never entered into any such agreement at either of those places or elsewhere; that he did receive a shipment of goods at Seattle about December 15, 1911, which came from the store at Anacortes, corresponding substantially to the first shipment of goods claimed by respondent to have been made, and that he sold the goods at fifty cents on the dollar, receiving $972 therefor. While he was permitted to deny that this was done in pursuance of the contract claimed by respondent to have been made, he was not permitted to testify as to the making of an entirely different contract between himself and Albert alone at Seattle, and that his receipt and sale of the goods was made in pursuance thereof, and that he paid the money in pursuance of such contract. Certain statements of Albert were also of-

fered to be proven as admissions that the contract sued upon was not made. They were also excluded.

Counsel for appellant contend that the trial court erred in denying its motion for a new trial. In this behalf it is insisted that the court erred in excluding evidence offered tending to show that Albert had, since December, 1911, made certain statements amounting to admissions that there never was any agreement made between him, respondent and appellant of the nature claimed by respondent. The formal offer was as follows:

"The defendant offers to prove by letters of Albert Greenbaum and by statements made by him to other persons, not being made in the presence of the plaintiff, that Albert Greenbaum, since December, 1911, has, several times, stated that the plaintiff Abe Greenbaum had no claim against Leopold Stern, and has several times stated that the acts testified to by the plaintiff and his witnesses as to what occurred, where Albert Greenbaum was present in Anacortes and Sedro Woolley, never occurred. I offer to have this testified to by Max Howe and Herman Kessler, and also by the copy of a letter from Stern to Greenbaum, and letter from Greenbaum to Stern, which are on file as exhibits for identification."

The letters had previously been offered in evidence and excluded by the court upon objection by counsel for respondent. They consist of an office copy of a letter of inquiry which appellant had mailed to Albert at Vancouver, where Albert then resided, and Albert's reply thereto, relating to the claims made by respondent touching the existence and terms of the contract. Plainly the facts stated in these letters, thus sought to be shown, were material, the only serious question being, Are these extra judicial statements of Albert admissible as tending to prove such facts? We have seen that respondent claims under an agreement to which Albert was a party as well as himself and appellant. If such an agreement were in fact made, Albert would, of course, be benefited by its performance and injured by its nonperformance, because he had parted with his goods, according to re-

spondent's story, in part consideration at least of appellant's promise to pay his debt to respondent. So that when Albert disclaims the making of that agreement and, in effect, all benefit thereof, he is making an admission against his own interest, and such admission relates to an agreement which, according to respondent's story, both he and Albert have a common interest in the performance of by appellant; for by such performance not only would respondent receive payment of his claim, but Albert would also thereby be relieved from the obligation of paying it. The rule as to the admissibility of evidence of admissions by one person as against another, where the question at issue is one in which both have a common interest, is well stated in 1 R. C. L. 485 as follows:

"The declarations of one person may be rendered admissible against another by virtue of the existence between them of a common interest; and this common interest exists, as a rule, whenever parties act jointly, or whenever they have joint rights or interests."

Among the authorities from which this rule is deduced, we note the following: *Deming v. Carrington*, 12 Conn. 1, 30 Am. Dec. 591; *Fickett v. Swift*, 41 Me. 65, 66 Am. Dec. 214; *Shaddock v. Town of Clifton*, 22 Wis. 110, 94 Am. Dec. 588; *United American Fire Ins. Co. v. American Bonding Co.*, 146 Wis. 573, 131 N. W. 994, 40 L. R. A. (N. S.) 661; *McShane v. Howard Bank*, 73 Md. 135, 20 Atl. 776, 10 L. R. A. 552. We do not say that these claimed admissions made by Albert are conclusive against respondent, but only that they are admissible as tending to show no contract of the nature claimed by respondent, and upon which he relies, was ever made. We conclude that the court was in error in excluding this offered evidence.

It was attempted to be shown by the testimony of the appellant himself that, shortly after he received the proceeds of the goods which were shipped to him from Anacortes in December, 1911, he paid the same over to a creditor of Albert whose claim he held as attorney for collection, in pursuance

of an agreement made with Albert, in pursuance of which agreement this shipment of goods was made from Anacortes to appellant. The making and terms of this agreement were also sought to be shown. This testimony was excluded by the court upon objection of counsel for the respondent, and this is claimed to be erroneous. We think this testimony was admissible as tending to show that no contract of the nature claimed by respondent had ever been made. The offered testimony was, in effect, an attempt to dispute the making of any such contract, by showing that another contract had been made and executed wholly inconsistent with the one under which respondent claims. *Peterson v. Seattle Traction Co.*, 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586; *Kain v. Sylvester*, 62 Wash. 151, 113 Pac. 573; *Simila v. Northwestern Improvement Co.*, 73 Wash. 285, 131 Pac. 831. We conclude that the exclusion of this offered testimony was erroneous.

Some contention is made in appellant's behalf that the alleged contract relied upon by respondent is void because of the statute of frauds, the theory being that it is simply an oral agreement to answer for the debt of another. We are of the opinion, however, that, according to respondent's complaint and the testimony introduced in his behalf, the promise to pay the debt by appellant was an original promise and based upon sufficient consideration to render it unaffected by the statute of frauds. 20 Cyc. 174; *Howell v. Harvey*, 65 W. Va. 310, 64 S. E. 249, 22 L. R. A. (N. S.) 1077. We conclude, therefore, that appellant was not entitled, as a matter of law, to have judgment in his favor upon this ground of contention.

Contention is also made that the evidence was such as to entitle appellant to judgment, as a matter of law, upon the question of the making of the contract as claimed by respondent. A careful review of the evidence, however, convinces us that this contention is not well founded, in view of

the testimony of respondent and his witnesses. Plainly the case could not have been properly taken away from the jury upon the ground that the facts were conclusive in appellant's favor on the question of the making of the contract sued upon.

We are of the opinion that appellant is entitled to a new trial. The judgment of the superior court is reversed, and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

MAIN, HOLCOMB, and BAUSMAN, JJ., concur.

MORRIS, C. J. (concurring)—I concur in the result, upon the ground that the exclusion of the evidence as to the payment of the proceeds to a creditor of Albert Greenbaum as showing an inconsistent contract was error.

[No. 12961. Department Two. March 7, 1916.]

JESSE THOMAS, *Appellant*, v. FRANK J. SCOUGALE *et al.*, *Respondents*.[1]

ATTORNEY AND CLIENT—COMPENSATION—PERFORMANCE OF CONTRACT—EVIDENCE—SUFFICIENCY. The dismissal of an action to recover an attorney's fee of 25 per cent of the amount recovered by any suit or compromise of the client's claims is unwarranted, where the evidence is undisputed that the attorney, after having commenced an action which was abandoned, joined in another action respecting a mortgage and an accounting due from his client, and by joining in opposing the adverse interests, accomplished the same result as by a direct suit, recovering $5,644.45 in cash and a third interest in certain lands; and it is immaterial that such cash was all consumed in paying an indebtedness of the client which was an entirely independent transaction.

MORTGAGES—FORECLOSURE—TITLE ACQUIRED AFTER SATISFACTION. Where the actual interest of a mortgagee was fully satisfied after foreclosure, he could obtain no title by the foreclosure sale, and could convey none by assignment of the sheriff's certificate of sale.

VENDOR AND PURCHASER — BONA FIDE PURCHASER — EQUITABLE TITLE. The doctrine protecting *bona fide* purchasers of land without notice applies solely to purchasers of the legal title, and the pur-

[1]Reported in 155 Pac. 847.

chaser of an equitable interest, especially at judicial sale, acquires the property burdened with every prior equity charged upon it.

HUSBAND AND WIFE—COMMUNITY PROPERTY—CONTRACTS BY HUSBAND—EMPLOYMENT OF ATTORNEY—ACQUIESCENCE BY WIFE. The husband's contract employing an attorney on behalf of the marital community to establish a trust in community lands and recover a share in a joint venture relating to the same cannot be avoided by the wife, as not authorized by her, where she was a party to all the suits brought relating to the matter, was represented by the attorney therein, showed considerable interest and concern in the litigation, and was consulted in regard to it, and the litigation was brought for the benefit of the community and resulted in benefit to it.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered February 10, 1915, dismissing an action for equitable relief, tried to the court. Reversed.

Fogg & Fogg, for appellant.

HOLCOMB, J.—Frank J. Scougale, one of the respondents and husband of respondent Cora Scougale, on August 9, 1909, employed appellant as attorney and gave to him the following memorandum in writing:

"Tacoma, Wash., Aug. 9, 1909.

"I hereby retain Jesse Thomas as my attorney to commence an action for me and my wife against Dominic Cavalero and Norval McGhie and their wives to establish my interest in the lands and timber in secs. 20, 29, 19, 30 and 32, twp. 22, N. R. 2 east, and to realize the value thereof, together with damages for breach of the agreement between me and said Cavalero and McGhie when we entered upon the joint adventure for the acquisition of said lands and timber, which were taken in the name of the Gig Harbor Timber (or Lumber) Co., and authorize him to associate with him Fred S. Fogg, and agree to pay my said attorney for his services twenty-five (25) per cent of whatever may be realized by suit, settlement or compromise of my claim in and to said property or damages. Frank J. Scougale."

Pursuant to the employment, appellant at once commenced an action for his clients as a marital community, for the purposes designated in the employment. Afterwards the action

so instituted came before this court on an appeal from an order granting a change of venue, and was reported in *State ex rel. Scougale v. Superior Court*, 55 Wash. 328, 104 Pac. 607. The substance of the cause of action stated in the complaint was there succinctly set forth, and it was determined that, on the facts alleged, the cause of action was one to establish a trust in real and personal property, and for damages for alleged breach thereof. The cause was transferred to Snohomish county, but it does not appear to have been tried and adjudicated, but was abandoned. Shortly thereafter, one Sandberg, to whom Scougale and wife had, about a year previously, given a mortgage for a large sum, began an action to foreclose this mortgage. The defendants defaulted, and Sandberg took judgment in the foreclosure proceedings for the sum of $13,255.60, principal, interest, attorney's fees, and costs. At the time this suit was commenced, another memorandum was made on the back of the former memorandum between appellant and Scougale, signed by Scougale on May 26, 1910, as follows:

"The within retainer is hereby extended to the foreclosure suit brought by Peter Sandberg a few days ago against myself and wife and Cavalero and McGhie *et al.* upon the same terms and rate of compensation."

That suit was permitted to go to judgment by default on the part of defendants Scougale, appellant representing Scougale in transactions had with the mortgagee and his attorneys; and it appears that, previous to the giving of the mortgage, Scougale had borrowed $2,600 from the Pacific National Bank of Tacoma, and Sandberg had gone upon his note with him, and a mortgage was given to indemnify Sandberg against loss by reason of this note or any future advancements. During the pendency of the action, Sandberg stated to appellant and to Scougale that all he wanted was to be made whole on that note at the bank and saved harmless; that he did not want the property, and that, when he was paid off out of the proceeds received from Cavalero, he

had no further interest in the property. There were about six years' accrued interest on the note and it aggregated $3,936.94. Although an attorney's fee of $1,000 had been allowed in the foreclosure, this was settled with Bates, Peer & Peterson, Sandberg's attorneys, for the sum of $100. These sums, together with $41.30 costs in foreclosure suit, were paid to and received by Bates, Peer & Peterson, attorneys for Sandberg, in satisfaction of his judgment and foreclosure. The interests of Scougale and wife were sold, however, under the foreclosure on January 14, 1911, and bid in by Sandberg for the total amount of the judgment and costs, and afterwards Sandberg assigned his certificate of sale, issued to him by the sheriff of Pierce county, to defendant Schliemann, which appellant says he believes was at the request of Scougale. Schliemann held his certificate of sale during the period of redemption, and on March 21, 1914, the sheriff of Pierce county made, executed, and delivered his sheriff's deed to Schliemann for all the right, title, and interest of the Scougales in and to the premises.

After the adjudication in the foreclosure suit, Sandberg filed a suit against Scougale, Cavalero, and McGhie, and their wives, for an accounting and winding up of the Gig Harbor venture and a division of the property or its proceeds. Appellant's contract of retainer was extended to this action upon the same terms, and appellant, on behalf of Scougale and wife, filed an answer and cross-complaint setting up their one-third interest in the land and timber not covered, as well as that covered, by the Sandberg mortgage. Sandberg's complaint and Scougale's cross-complaint covered substantially the same field as Scougale's first action hereinbefore referred to. The case was tried in Snohomish county, and Sandberg was represented by Messrs. Bates, Peer & Peterson. No effort was made to segregate the interests of Sandberg and Scougale in that action, their combined interests being referred to as "the Scougale interest" or "the Scougale third," and they prosecuted a joint appeal

from the judgment of the superior court to this court (*Sandberg v. Scougale*, 75 Wash. 313, 134 Pac. 1051), and obtained a somewhat more favorable judgment. When the remittitur went down in that case, appellant and Mr. Peer went to Everett and, in conjunction with Mr. Coleman, one of the attorneys for Cavalero, prepared a final decree. Pending the appeal, Cavalero had sold the logging equipment, logs, and piles, and had received a large sum of money subsequent to the time the original decree was entered, and this was taken into account.

The decree after appeal, as prepared and agreed to by the attorneys, awarded to Sandberg and Scougale one-third of the net funds in Cavalero's hands, after being reimbursed for advancing Scougale's third of the original cost of land and timber, with legal interest thereon, one-third of about $3,000 in bills receivable, which were then of doubtful value and of which nothing has been collected, and one-third of the three hundred and sixty acres of logged-off land. Appellant and the attorneys for Sandberg received from Cavalero the sum of $5,644.45 in cash. With this sum they paid Scougale's obligations to Sandberg on account of the note to the bank, with the six years' interest, and the court costs and attorney's fees which Sandberg actually paid out in the foreclosure suit and in the suit for accounting, which took all of the above sum of cash except $388.55, which appellant received and applied as part payment of his fee. He has received no other compensation. The money above mentioned was received from Cavalero and the Sandberg claim paid off in December, 1913. This action by appellant is for his stipulated share of the property, under the terms of his employment, recovered for his clients, and to establish a trust to the extent of his interest in the interest recovered for his clients, and to compel a partition of his interests from all the other interests therein.

One of the allegations of the complaint is that the defendants Prochaska and wife have a right to purchase a certain

described tract of twenty acres, at the price of $60, from the other defendants in the action, and it is conceded that this right is prior to any right of appellant. Another allegation of the complaint is that the interest of the defendants Scougale and wife is an undivided one-third interest in all of the property, subject to the right of Prochaska and wife to purchase the above twenty acres, and subject to the right of appellant to a one-fourth thereof under his contract. Another allegation of the complaint is that the interest of the defendants Schliemann and wife, if any, is simply as trustee for the defendants Scougale and wife. Defendants Cavalero and wife appeared by their attorneys, but expressly disclaimed any interest in the interest claimed by appellant adverse to him. Scougale and wife and Schliemann and wife appeared by the same attorneys, but made separate answers. Schliemann and wife put in issue all the allegations of the complaint, and further affirmatively alleged the foreclosure proceedings hereinbefore referred to, the sale under foreclosure to Sandberg, the assignment of the certificate of sale to Schliemann, which they alleged was in good faith and for value, and without any knowledge or notice of any claim of right, title, interest, or estate in the premises on the part of appellant, and that they were innocent purchasers for value; that the period of redemption expired and the premises were unredeemed. Scougale and wife put in issue all the material allegations of the complaint, and further answered affirmatively that, at all times mentioned, they were husband and wife, and any right, title, interest, or estate which might rightfully be claimed by them, or either of them, was their community property; that the contract made between Frank F. Scougale and appellant was not made by defendant Cora Scougale; that she was not a party thereto nor bound by any of the terms and conditions thereof, and that the contract was ineffectual to create any lien or incumbrance upon the community interest or property owned by the answering defendants.

Appellant's reply to the answer of Schliemann and wife put in issue the affirmative allegations of their answer, and denied that the assignment of the sheriff's certificate to them was for value, or that the assignment if made was for or on behalf of the Scougale community. The answer of defendants Scougale was also replied to, and the affirmative allegations therein contained were denied, except that it was admitted that defendant Cora Scougale did not sign the contract, but alleged that she had knowledge thereof and acquiesced in it. There is no evidence on the part of Schliemann and wife in support of their affirmative allegation of the purchase of the assignment from Sandberg of the certificate of sale under foreclosure for value, in good faith, and without notice. There is no evidence on behalf of Scougale and wife to sustain their affirmative allegations.

Upon the conclusion of the testimony, defendants Scougale and wife and Schliemann and wife moved the court to dismiss the action with judgment in their favor, for the reason that appellant had not made a case sufficient to entitle him to a decree. The motion was granted, the court remarking:

"It seems to me that the plaintiff entered into a contract to take part of the proceeds of suit if he won anything and if he did not he did not get anything, and on the record here he did not. The suit took every bit of the property. I understand the plaintiff's client got nothing out of it."

Appellant then inquired of the court if it interpreted the contract that appellant was not to get anything under it until not only Cavalero's claim but Sandberg's claim was all cleared off, to which the court replied:

"They do not appear to be cleared off. You can probably bring another suit and we will try to arrange the decree so that you will not be prevented from that. You cannot fasten any claim on the real estate. That is all that I am deciding now."

We think the court was in error when it concluded, at the close of the evidence, that appellant's clients got nothing out

of the litigation; and that it was also in error when it concluded that it does not appear that the Cavalero claim and the Sandberg claim had been paid off. There is no dispute of the evidence of appellant that, as a result of the litigation over the property with Cavalero and McGhie, the net sum of $5,644.45 in cash and an undivided one-third interest in certain described lands in sections nineteen and thirty of the lands heretofore mentioned were acquired by the Scougales. It is immaterial whether appellant accomplished this by a direct suit, as at first attempted, or by joining in litigation with Sandberg against the other parties in interest, which accomplished the same result. Appellant's original employment was to establish Scougale and wife's one-third interest in the property in question. Scougale's indebtedness to the bank, for which the mortgage was given to Sandberg to indemnify him as surety, was a totally independent transaction. It did not, and could not, interfere in any way with the establishment of the trust in favor of the Scougales in all the property in controversy between them and Cavalero, McGhie, and the Gig Harbor Timber Company. Sandberg, however, having a prior lien against the interest of Scougale and wife, had a perfect legal right to take action against Cavalero and McGhie and the timber company to establish his lien thereon. Appellant, by joining with Sandberg in that proceeding, accomplished for the Scougales all that it could have accomplished by the original suit. He secured in that action the interests of the Scougales subject to the lien of Sandberg. The lien of Sandberg, although nominally for a much larger sum, was in fact no greater than his actual financial interest. This, as shown by the undisputed evidence on behalf of appellant, was, as heretofore stated, a total of $5,255.90, after allowing for the total amount of Sandberg's actual mortgage, interest, costs, and attorney's fees, and the costs and attorney's fees expended by him in the litigation between him and Scougale, Cavalero, McGhie, and the Gig Harbor Timber Company. This was all satisfied out of the

cash received and Sandberg had no further interest. Having received his money, he had no title under his foreclosure sale and could convey none to the defendants Schliemann. The contention of the defendants Schliemann, therefore, that they stand in a position of *bona fide* incumbrancers without notice is not tenable. The assignment by Sandberg to Schliemann was probably an evasion and a mere subterfuge. The most which the mortgage could incumber was the equitable estate asserted and thereafter determined to be in the Scougales. The doctrine which protects *bona fide* purchasers without notice is applicable solely to purchasers of the legal title; and the purchaser of an equitable interest purchases at his peril and acquires the property burdened with every prior equity charged upon it. *Shoufe v. Griffiths*, 4 Wash. 161, 30 Pac. 93, 31 Am. St. 910; *Norgren v. Jordan*, 46 Wash. 437, 90 Pac. 597. Especially is this true where they purchased merely under judicial sale.

There is a further reason why the action should not have been dismissed, in that twenty acres of land in controversy was not covered by Sandberg's mortgage nor by the sheriff's deed. It had never been mortgaged or sold, and is part of the three hundred and sixty acres covered by the final decree of the superior court of Snohomish county wherein it was adjudged to belong, two-thirds to Cavalero and one-third to Sandberg and Scougale as their interests might appear. Sandberg's mortgage never having included this twenty-acre tract, the one-third interest therein belongs to Scougale at this time. It is clear that the Scougales got this interest as the result of the litigation conducted for them by appellant.

As to the contention that Mrs. Scougale is not bound by the contract made by her husband with appellant, we think there is no merit in it. The testimony of appellant is not contradicted that Mrs. Scougale showed considerable interest and concern in the litigation, that he saw her one or more times at her house, and that she called him up by telephone one or more times inquiring as to the progress of matters;

and the litigation was certainly brought and conducted for the benefit of the community and resulted in the benefit of the community. She was a party plaintiff or defendant to every suit concerning the matters. She was represented by appellant in all of them. She cannot, under the facts, deny that appellant was her attorney and was representing her under the contract. *Pearl Oyster Co. v. Seattle & M. R. Co.*, 53 Wash. 101, 101 Pac. 503; *Jones v. Jones*, 72 Wash. 517, 130 Pac. 1125.

Appellant very substantially performed his agreement with Scougale to the very great advantage of both him and his wife. "The laborer is worthy of his hire," even if he is only an attorney, and a contract of a business man with an attorney, fully performed by the attorney, ought to be as good, in morals and in law, as any other contract.

The judgment will be reversed, and the cause remanded to the court below with instructions to grant judgment in favor of appellant for the one-fourth of the $5,644.45 recovered in money, less the $388.55 received by him, and establishing his undivided one-fourth interest in the one-third interest of Scougale and wife in the lands described in the complaint, subject to the right of the defendants Prochaska to purchase twenty acres under their purchase option; and that appellant have the amount of his one-fourth interest in the cash money recovered added to his one-fourth interest in the one-third of the land, and that he have partition as prayed. 30 Cyc. 194.

MORRIS, C. J., PARKER, BAUSMAN, and MAIN, JJ., concur.

[No. 12997. Department One. March 7, 1916.]

HENRY F. EGBERS *et al.*, *Respondents*, v. THE CITY OF SEATTLE, *Appellant*.[1]

MUNICIPAL CORPORATIONS—STREETS—GRADING—INJURY TO PROPERTY—INVASION—LIABILITY. Where, in making a street grade, plaintiffs' property was invaded and covered by the slope and depreciated in value to the extent of $500, plaintiffs can recover that sum, regardless of the fact that it was an original grade of the street; and it is immaterial that, had the city avoided the invasion and all liability by building a bulkhead, the actual damage would have been greater, since there was an actual invasion and the city cannot speculate on what might have been done.

Appeal from a judgment of the superior court for King county, Back, J., entered April 2, 1915, upon findings in favor of the plaintiffs, in an action for damages to property. Affirmed.

James E. Bradford and *Frank M. Egan*, for appellant.

W. D. Lambuth, for respondents.

ELLIS, J.—Action to recover damages for an invasion of real estate in the grading of a street. The plaintiffs' property consists of two lots, one of which abuts lengthwise on the street, and the other adjoins the first on the north. The action was tried to the court without a jury. The court, after finding the plaintiffs' ownership of the two lots and the character of their improvement, found that their value prior to the damage here in question, was $1,200. The court then found:

"That within the past two years the defendant, having laid out Avalon Way as a boulevard of the city of Seattle, the portion of said boulevard adjacent to plaintiffs' said property being acquired by condemnation under eminent domain, and neither the plaintiffs nor their said property being included in any such proceedings, afterwards passed an ordinance, numbered 31,563, for the grading of 36th avenue

[1]Reported in 155 Pac. 751.

southwest and other streets, including Avalon Way, in such manner that Avalon Way, with an original and reasonable grade, is filled a height of about twenty-two feet above the surface of the said lots, and the dirt from said fill, allowed, in a slope of one and one-half to one, to cover all of said lot six and a small portion of lot five, destroying a large part of plaintiffs' said trees, berries, flowers, and filling the well. That because of said grade and fill as aforesaid, the said property was thereafter worth no more than $700, and if a bulkhead had been used to retain the dirt, instead of a slope, the property would then have been worth only $600, after said grading."

On these findings and an appropriate conclusion, the court entered judgment for the plaintiffs in the sum of $500 and costs. Defendant appeals.

No exception was taken to the court's findings. The appellant's sole contention is that they are insufficient to sustain the judgment. It is argued that, inasmuch as this was an original grade of Avalon Way, the plaintiffs would have had the right to construct a bulkhead to retain the dirt instead of invading respondents' property by the slope, and that, had such a course been pursued, the respondents could have recovered no damage; and further, that inasmuch as the court found that the building of a bulkhead without invading respondents' property would have damaged the property more than the amount of damage found to have been inflicted by the actual invasion, therefore the invasion was a benefit rather than a damage.

The argument is palpably unsound. The respondents' property was invaded to their damage and in the sum of $500. Under our decision in the case of *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820, they were entitled to a judgment in that amount. The finding that some other method of improving the street would have damaged the property more was foreign to any issue in the case and was wholly immaterial. The fact that the making of a bulkhead would have been *damnum absque injuria* (so as-

suming without so deciding), has no bearing upon the actual, reasonable damages for an actionable invasion of the property. The court has no right to speculate on what might have been done, but will confine itself to the only issue before it, presented by the admitted fact that there was an invasion and in fact a taking of at least one-half of respondents' property, to their damage. Whether the city had the same right to make an original grade without the payment of damages in case of a street acquired by condemnation as in case of a street acquired by dedication, we do not decide. On the issue here it is a moot question. This action is not one for damages for change of grade, but for an actual invasion and taking of the respondents' property.

The judgment is affirmed.

MORRIS, C. J., MOUNT, CHADWICK, and FULLERTON, JJ., concur.

[No. 13016. Department One. March 7, 1916.]

FRED W. OLSEN, *Respondent*, v. CHARLES W. OLSEN, *Appellant*.[1]

WORK AND LABOR—IMPLIED CONTRACT—SUPPORT OF PARENT. A son cannot recover of his father for the board and keep of his mother, as upon an implied contract, where it appears that, to benefit her health, he took her from a sanitarium and brought her to his home on the coast without the knowledge of his father, no justification therefor and no breach of legal duty by the father being shown; since the presumption is that a parent is domiciled with a child by invitation, such suits are not favored, and the son was a volunteer and trespasser and cannot claim compensation for his wrong.

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 7, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

Beechler & Batchelor, for appellant.

Curtis J. Beedle, for respondent.

[1]Reported in 155 Pac. 747.

CHADWICK, J.—Charles W. Olsen and his wife, Leonore, are residents of the state of Illinois. Mrs. Olsen was sick in the spring of 1912 and, upon the advice of the attending physician, went to a sanitarium for treatment. Respondent was, at that time, a resident of Seattle. He was in Illinois at the time, presumably in attendance upon his mother. Conceiving that it would be beneficial to take his mother away, he did so without saying anything to appellant, and without his knowledge. He first intended to take her to Evanston to an aunt. He expected to work in Chicago for a month or two, and then take his mother and sister, who was with her, home. Within a month he brought his mother to Seattle, where, so far as the record shows, she still is.

Respondent justifies his act by alleging and testifying that his mother's health was such that it was necessary to bring her to the coast; that the doctor advised the change that her life might be saved. In this, he is not sustained, either by his own testimony, when considered as a whole, or by the testimony of others. Indeed, he is contradicted by his conduct, as well as by a letter which he addressed to the attending physician from Evanston, in which he says:

"My dear Doctor:

"You doubtless were very much surprised when you learned that I had taken my mother north. Of course I know that had you been cognizant of what I was going to do, you would hardly have approved of my doing so at the time I did, but circumstances were such that I myself had to leave and I concluded at the last minute to take Mama along. . . . I am going to work in Chicago for a couple months and am intending to keep Mama and Agnes at least until April first. . . . I suppose my father feels a little offended at me but he is a good fellow anyway, and will realize that I was acting only for Mama's good. . . . Sincerely,

"Fred W. Olsen."

This action was brought to recover for the "board and keep" of the mother after respondent brought her to Seattle. The case was tried by a jury. A judgment on the verdict

in the sum of $450 was entered in respondent's favor. It is admitted that there is no express contract to pay the charge made. The court instructed the jury:

"An implied contract is one that the law infers from facts and circumstances. If the plaintiff furnished necessaries to his mother and under such circumstances as established an understanding between the plaintiff and the defendant that the plaintiff should furnish the same and that the defendant should pay for the same, then the law would imply a contract to pay."

The court then proceeded to tell the jury, in a negative way, that if there was a reasonable danger or probability that a further residence at the domicile of her husband would jeopardize the health of his mother, respondent would be justified in taking her away, and entitled to recovery upon an implied contract. Granting this to be the law, but without so holding, there is nothing in the testimony to sustain the verdict. It is not shown that appellant was unmindful of his wife's health and welfare, or that he had refused to dispose of her as advised by his physician, or, if it were necessary to bring her to this coast (a fact not proven, and an intent not formed until after respondent had taken her to Evanston), that appellant was either unable or unwilling to do so.

Because of the great abuses arising in such cases as this, the law, in its development, has evolved a strong presumption that may not be overcome except by evidence having some degree of certainty. Many cases hold that nothing short of an express contract will avail. But there is no word, act, or deed of appellant upon which the law can predicate an implied contract. Suits by a child against a parent for support are not favored. The presumption is that a parent who is domiciled in the home of a child is there by invitation (an admitted fact in this case), and that the service rendered is prompted by the better instincts of love

and filial duty. *Miller's Appeal*, 100 Pa. St. 568, 45 Am. Rep. 394; 29 Cyc. 1620.

If one having an opportunity to make an express contract fails to parley with the one who has an interest, and wrongfully takes the subject-matter into his own hands to deal with in his own way, he should not be heard at a bar of justice to assert an implied contract. Contracts are grounded in duties and rights, not in derelictions and wrongs. Respondent avoided the duty that was upon him to contract with appellant when he purposed to invade his right to select the domicile of his wife. He was a volunteer and a trespasser. He assumed a burden that he cannot put down.

The law protects contracts that are made. It holds parties to implied promises where it is clear that there has been a breach of legal duty. It has never, so far as we know, permitted a trespasser upon the rights of another to claim compensation for his wrong under the coercive persuasion of an implied contract.

There being neither fact nor law to sustain the verdict, the judgment is reversed with instructions to dismiss the complaint.

MORRIS, C. J., MOUNT, and ELLIS, JJ., concur.

[No. 13096. Department Two. March 7, 1916.]

FRED F. WELD *et al.*, *Respondents*, v. J. W. WHEELER, *Appellant*.[1]

APPEAL—RECORD—STATEMENT OF FACTS—NECESSITY. In the absence of a statement of facts, errors cannot be assigned upon the giving of instructions that relate to the proofs and failure of proofs, or in denying a motion for a new trial and entering judgment involving consideration of the facts.

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 22, 1915, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

Byers & Byers, for appellant.

Geo. McKay, for respondents.

PER CURIAM.—On October 15, 1915, the statement of facts on this appeal was stricken from the files of the court for failure to file in time. Appellant now urges a number of errors, which cannot be considered by reason of the absence of a statement of facts.

Appellant insists that its third assignment of error, that the court erred in refusing to give instructions one and five, requested by him, should be considered regardless of the absence of a statement of facts, inasmuch as these requested instructions are here in the transcript. But an inspection of them discloses that they relate to the proofs and failures of proof, and without a statement of facts, we cannot consider them.

Appellant also insists that the fourth and fifth assignments of error, that the court erred in denying appellant's motion for a new trial, and erred in entering judgment for respondents, should now be considered. But these also involve consideration of the facts. The entire argument of

[1]Reported in 155 Pac. 748.

appellant on these assignments is based upon the facts, and the statement of facts having been stricken, we cannot presume them to be erroneous.

The judgment is affirmed.

[No. 13101. Department One. March 7, 1916.]

FIDELITY & DEPOSIT COMPANY, OF MARYLAND *et al.*, *Respondents*, v. NORTHWESTERN NATIONAL BANK OF BELLINGHAM, *Appellant*.[1]

PRINCIPAL AND SURETY—BOND ON PUBLIC WORKS—RIGHTS OF CREDITORS—ADVANCE TO CONTRACTOR—APPLICATION OF PAYMENTS. Where a surety company on the bond of a subcontractor on highway work was obliged to pay debts and take over the work, and afterwards earned money in the performance of the uncompleted work, before a bank that had made advances to the subcontractor can claim reimbursement from the surety company, it must show that all the money advanced was used by the subcontractor in that particular work; and it has no claim on the money earned by the surety where a substantial part of the advances were used in the payment of salaries of officers and other items not entering into the performance of the work.

SAME—RIGHTS OF CREDITORS — ASSIGNMENTS BY CONTRACTOR—RESCINDING. An assignment directing the state and county auditors to pay all money due or that will become due from time to time for work performed on certain highway work by a subcontractor may be rescinded by the principal contractor after the subcontractor defaulted and gave notice that it could not perform the contract.

SAME — RIGHTS OF CREDITORS — ADVANCES TO CONTRACTOR — PAYMENTS—FAILURE TO APPLY. Where a bank advanced money to a subcontractor on highway work, taking notes therefor, and received warrants on the work for more than sufficient to pay the notes, but failed to apply the same thereto and allowed the same to be checked out on general account upon other contracts, it cannot claim reimbursement from the surety on the bond of the subcontractor after the latter's default.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered May 18, 1915, upon find-

[1]Reported in 155 Pac. 743.

ings in favor of the plaintiffs, in an action to determine conflicting claims to a deposit in court, tried to the court. Affirmed.

Black & Black and *Craven & Greene*, for appellant.

Trefethen, Grinstead & Laube, for respondent Fidelity & Deposit Company.

Kellogg & Thompson, for respondent Sauset.

MOUNT, J.—This action is for a preference right to a fund of $5,799.40, paid into the registry of the court by the state. The plaintiff, Fidelity & Deposit Company of Maryland, and the defendants K. Sauset and the Northwestern National Bank of Bellingham each claim a preferential right to the fund. The other defendants disavowed any claim to the fund, and were therefore dismissed. Upon a trial of the issues, the court awarded the plaintiff and the defendant K. Sauset the right to the whole fund, and denied the Northwestern National Bank of Bellingham any relief, and taxed the costs to the bank. This appeal was taken by the bank from that judgment.

The facts are as follows: In May, 1913, Whatcom county entered into a contract with the respondent Sauset for the construction of permanent highway No. 3 in Whatcom county, which highway is commonly known as the Northeast Diagonal Road. This contract required Mr. Sauset to pay all laborers and materialmen for work done under the contract. Thereafter, on May 24, Mr. Sauset, with the consent of Whatcom county, sublet the entire contract to the American Contracting Company. This last contract, among other things, provided that warrants drawn by the county and the state in payment for the work were to be indorsed and delivered by Mr. Sauset to the American Contracting Company. Mr. Sauset required a bond of indemnity in the sum of $20,000 for the faithful performance of this contract. The Fidelity & Deposit Company of Maryland, the plaintiff

and respondent herein, became surety for the subcontractor. The application for the bond provided that the surety should be subrogated to the rights of the American Contracting Company, and contained an assignment of all the money to become due to the subcontractor under the contract. This bond was executed in May, 1913.

Thereafter on September 9, 1913, the subcontractor applied to the Northwestern National Bank of Bellingham for a loan of money for the purpose of performing the contract. The bank refused to loan the money to the American Contracting Company without an assignment of the moneys to become due from the state and county under the contract. Thereupon the American Contracting Company signed an order addressed to the state auditor and the auditor of Whatcom county, as follows:

"Will you kindly deliver all money now due us or that will become due from time to time for work performed on the Northeast Diagonal Road, to the Northwestern National Bank of Bellingham, Wash., and allow them to receipt for the same."

This order was also signed by Mr. Sauset, the original contractor. At the time this order was given, the bank knew that the subcontractor had given a bond to the contractor, but had not examined the contract with reference to the assignment to the surety company of the moneys to become due under the contract. Thereupon the bank advanced moneys upon promissory notes of the American Contracting Company, as follows: October 8, 1913, $1,500; October 21, 1913, $1,000; and November 1, 1913, $1,000. The American Contracting Company, at the time this money was borrowed upon these notes, was engaged in the performance of other contracts. This money was deposited to the general account of the American Contracting Company, and checks were drawn against the account indiscriminately.

After the order above referred to was drawn, Mr. Sauset indorsed checks which were delivered to the bank amounting

to $9,249.14, of which sum the bank credited upon the notes the sum of $284.29. On December 30, 1913, the American Contracting Company gave notice of its inability to complete the contract. The surety company, upon the demand of the original contractor, Mr. Sauset, thereupon paid the laborers and materialmen the sum of $13,770.64, which the American Contracting Company was liable for on account of work done under the contract. The work was still incomplete. The bonding company then entered into a contract with Mr. Sauset to finish the work as an employee of the bonding company, and this was done for an agreed price of $2,879.97.

At the time the subcontractor notified the surety company of its inability to complete the contract and the surety company was required to take over the work and complete the contract, Mr. Sauset and the surety company notified the bank and the state and county auditors that the order theretofore given by the American Contracting Company and Mr. Sauset, and hereinabove quoted, was rescinded. After the work was completed, the state paid the balance due upon the completion of the work into the registry of the court. The bonding company, Mr. Sauset, and the bank are now each claiming a preference to this money.

The trial court, among other things, found:

"That the evidence does not show that the said advancement of $3,500, or any definite portion thereof, was disbursed in payment of claims for labor or material on the Northeast Diagonal Road; that it does clearly appear from such evidence that a considerable portion of this account was used to pay the proper salaries of those persons who were officers of the subcontractor, premium on the subcontractor's bond, interest charges to the bank, office rent, automobile tires, and supplies, and shipping charges."

The appellant relies principally upon the case of *Puget Sound State Bank v. Gallucci*, 82 Wash. 445, 144 Pac. 698, where we held the surety company liable on its bond for the repayment of money loaned by a bank to a contractor upon

public work, where the money was used by the contractor in the construction of the work. In that case we said:

"It will be noticed, however, that the bonds not only secure these things in the language of the statute; but the bonds are also conditioned that Gallucci '*shall faithfully perform all of the provisions of said contract;*' and that one of the provisions of the contracts is that he '*will pay all just debts, dues and demands incurred in the performance of said work,*' which provision is unqualified by any other language of the contracts. We cannot escape the conclusion that this provision of the contracts includes debts incurred by Gallucci of the nature here involved; that is that he incurred such debts to the bank 'in the performance of said work,' though this conclusion might not be correct were the bank's rights rested alone upon the language of the bonds and statute."

We are satisfied that, under the holding in that case, before the Northwestern National Bank could claim any reimbursement from the surety company, it was necessary to show that all the money so advanced was used by the contractor in the performance of this particular work. The trial court found, as we have seen above, that a very substantial portion of the money advanced by the bank was not used in the performance of the work, but was used in payment of salaries of officers of the corporation, and other items which do not enter into the performance of the work at all. In this case the subcontractor failed to perform his contract. The surety company, as surety for the subcontractor, took over the work, paid a large amount of money upon outstanding claims for work and material furnished, and then sublet the contract to the original contractor; and the original contractor thereupon finished the work. The money which was subsequently paid into the court came as a result of the surety company finishing the contract. Under these circumstances, it seems plain that the surety company is entitled to the money which it afterwards earned in the performance of that uncompleted work.

Much stress is laid by the appellant upon the order or assignment which we have above quoted; and it is strenuously argued that this assignment was binding upon Mr. Sauset and upon the surety company because it consented to Mr. Sauset indorsing the warrants, and to the bank collecting them. But it is plain from the language of the assignment itself that only the warrants or money *earned by the subcontractor* upon the work was assigned, because it recites:

"Will you kindly deliver all money now due us or that will become due from time to time for work performed on the Northeast Diagonal Road."

This, of course, can only mean that the assignment was for moneys which were to become due to the American Contracting Company, the subcontractor, which that company earned in the performance of the work. When that company failed to perform the contract, and notified the original contractor and the surety that it was unable to perform its contract, clearly we think Mr. Sauset had a right to rescind the order that was given. Furthermore, the trial court found that the bank had received in warrants more than $9,000, and had applied upon the notes only the sum of $284.29. What became of the rest of this money does not appear. It was the duty of the bank to credit this money upon the notes. The surety company was clearly not liable for money that was put into a general account and checked out upon other contracts, or for work that was not performed upon the Northeast Diagonal Road under that contract.

It is true there is some indefinite testimony in the record that a part of this money for these warrants was paid for labor and materials in the construction of the Northeast Diagonal Road, but it is not shown what amount was so paid; and it is not shown that the amount of money which the bank received upon these warrants, issued by the state and the county and indorsed by Mr. Sauset, was not sufficient to pay for all the labor and material which the subcontractor used in the construction of this particular road, and also to pay

these notes held by the bank. Before the bank would be entitled to a preference to the fund in court, or to relief against the surety upon the subcontractor's bond, it must show, under the *Gallucci* case, that the money which it advanced was used exclusively in this particular improvement. The surety company, so far as this record shows, was not liable for any work performed by the subcontractor upon other contracts. It was surety only upon this particular contract. We are satisfied, therefore, that the moneys earned by the surety company and by Mr. Sauset in the completion of the work, which was paid into court, were rightfully ordered by the trial court to be paid to the surety and Mr. Sauset in preference to the bank.

Several other questions are argued in the briefs; but from what we have already said, we think it follows that the judgment must be affirmed, and no further notice of other questions is necessary.

MORRIS, C. J., CHADWICK, ELLIS, and FULLERTON, JJ., concur.

[No. 13209. Department Two. March 7, 1916.]

MARK M. LITCHMAN *et al.*, *Appellants*, v. WILLIAM A. SHANNON *et al.*, *Respondents*.[1]

COLLEGES AND UNIVERSITIES — TUITION AT STATE UNIVERSITY — STATUTES — CONSTITUTIONALITY. Laws 1915, p. 239, providing an entrance and tuition fees to be charged to students of the university of Washington is a valid exercise of legislative authority; as it is not forbidden by Const., art. 26, § 4, requiring the establishment of systems of public schools free from sectarian control and "open to all children of the state"; art. 9, § 1, requiring ample provision for the education of all resident children, without distinction or preference; or art. 9, § 2, providing for a general and uniform system of public schools, to include common schools and such high schools, normal schools and technical schools as may hereafter be established.

CONSTITUTIONAL LAW — CLASS LEGISLATION — PRIVILEGES AND IMMUNITIES — COLLEGES AND UNIVERSITIES. Laws 1915, p. 239, providing an entrance and tuition fees for students at the state university does not grant to any citizen or class privileges or immunities which upon the same terms shall not equally belong to all citizens, in violation of Const., art. 12, § 1, by reason of the fact that students in the state college of Washington are not charged entrance or tuition fees.

CONSTITUTIONAL LAW — STATUTES — CONSTITUTIONALITY — PRESUMPTIONS. The presumption is in favor of the constitutionality of acts of the legislature, and they will not be declared void unless there is no reasonable doubt about their invalidity.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 4, 1915, upon sustaining a demurrer to the complaint, dismissing an action for an injunction. Affirmed.

Jacob Kalina, *Thos. F. Murphine*, and *Mark M. Litchman*, for appellants.

The Attorney General and *Edward W. Allen*, *Assistant*, for respondents.

[1]Reported in 155 Pac. 783.

HOLCOMB, J.—The legislature of 1915 passed an act entitled:

"An act for the support of the University of Washington and relating to the erection and equipment of two buildings at the university, making appropriation therefor and providing a system of student fees and creating a building fund." Laws of 1915, p. 239.

The act provides that the university shall charge each student an entrance fee of ten dollars, and a tuition fee of ten dollars per semester, or twenty dollars per annum. This money is to be set aside in the state treasury in a fund called the "University of Washington Building Fund," for the purpose of constructing two buildings. Appellants seek a reversal of the judgment of dismissal, which followed their election to stand upon their complaint, to which respondents' demurrer had been sustained. In form the suit was an action for injunction to restrain the authorities of the University of Washington from carrying into effect the provisions of the act heretofore mentioned. The legal proposition involved is the constitutional power of the legislature to require students at the University of Washington to pay matriculation or tuition fees.

Appellants contend that the act in question is in violation of the fourth paragraph of art. 26, constitution of Washington, as follows:

"Provision shall be made for the establishment and maintenance of systems of public schools free from sectarian control, which shall be open to all the children of said state."

And of art. 9, § 1, as follows:

"It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex."

And also, art. 9, § 2, as follows:

"The legislature shall provide for a general and uniform system of public schools. The public school system shall in-

clude common schools, and such high schools, normal schools, and technical schools as may hereafter be established. . . "

They further contend that it is repugnant to art. 1, § 12, constitution:

"No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

Appellants allege that they are of such age that they are entitled to enter the university; that they are desirous of doing so; that they are unable to pay the fees; that they are children of wage-earning parents belonging to that class of people one-half of whom earn less than $500 per year; that they have an earning capacity of less than ten dollars per week; that because of their class and condition, the fees provided for by this act are prohibitive to them, and they are therefore unable to attend the university. They further allege that, at another institution of higher education of the state, viz., the State College of Washington, located at Pullman, students are not required to pay any matriculation and tuition fees, and that, therefore, the system of education provided by the legislation in force is not uniform, and that it discriminates in favor of those students attending the State College at Pullman.

The question to be determined is simply and only a question of constitutional and legislative power. We have so frequently held, in substance, as in *State v. Ide*, 35 Wash. 576, 77 Pac. 961, 102 Am. St. 914, 67 L. R. A. 280, that the courts will presume that an act regularly passed by the legislative body of the government is a valid law and will entertain no presumptions against its validity; and when the constitutionality of an act of the legislature is drawn in question the courts will not declare it void unless its invalidity is so apparent as to leave no reasonable doubt upon the subject—that that may be considered as the settled policy of the courts of Washington. Appellants argue that the provision for the

establishment and maintenance of systems of public schools free from sectarian control, which shall be open to all the children of the state, constitutes a limitation upon legislative power, in that any part of the educational system of the state shall be considered a part of the public schools, and that the mandate that they shall be *open* to all the children of the state means that they shall be *free* to all the children of the state. It is perhaps advisable to review briefly the history of the university of Washington, the legislation in regard thereto, and the matter the constitution makers had in view when they adopted the provisions of the constitution relating thereto.

The state university was inaugurated as a territorial university in 1861. On November 4 of that year it was opened for students. The first comprehensive act for its regulation was passed January 24, 1862. Section 12 of that act (Laws 1862, p. 45, § 12), is as follows:

"The fee of admission to the regular university course in the department of literature, science and the arts, shall not exceed ten dollars, but such course or courses of instruction as may be arranged under the provisions of section nine of this act, shall be open without fee, to the citizens of this territory."

The Laws of 1877, page 241, provided an appropriation to pay for forty-five scholarships, free of tuition, at the university, the appointments to be made by the members of the legislature. By act of 1883 (Laws 1883, p. 68), a similar provision was made. In 1886 (Laws 1885-6, p. 149, § 5), it was provided:

"Each member of the legislative assembly of this territory may appoint one person, who may attend the university without payment of any tuition, . . . All persons attending the university as students, outside of the county of King, during each school year, shall have deducted from their tuition the actual cost of their going to and returning from such university to their respective homes."

The act of January 27, 1888 (Laws 1887-8, p. 232), contains like provisions.

The constitution was adopted in 1889, and there is no provision in it that the entrance to or tuition of the university shall be free or otherwise.

Immediately following the adoption of the constitution, in 1890, the legislature provided that the board of regents was authorized to prescribe regulations for the admission of students and prescribe such rates of tuition as it might deem expedient; and further provided that students residing outside the county of King should have deducted from their tuition their traveling fares. In 1893, for the first time apparently (Laws 1893, p. 293, § 6), the legislature provided that,

". . . tuition in the university, except as may be provided by the regents with reference to the arts or to special courses of study, shall be free to all *bona fide* residents of this state."

The legislature of 1897 enacted the same provision. Laws 1897, p. 427, § 183. The legislature of 1909 enacted the same provision. Laws 1909, p. 238, § 2; Rem. & Bal. Code, § 4817. The legislature of 1915, returned to the tuition and entrance fee plan. Laws 1915, p. 239.

It will thus be seen that, when the constitution was framed, its makers had in view the system by which the University of Washington had up to that time been, in part at least, sustained. At times thereafter, the legislative discretion has seen what it considered the wisdom of requiring payment of reasonable entrance and tuition fees by students, while at other times it has dispensed with such charges.

Whatever may be our view as to the wisdom or policy of the present legislation, with which we have no concern, it is purely and simply a question of power. While it may be true (though it is not now necessary to so determine) that, as to the common schools, the fourth paragraph of art. 26 may mean that such schools shall be open and *free* to all the children of the state, we do not believe that it applies to the uni-

versity of the state. Section 2, art. 9, of the constitution, defines what the public school system shall include, viz.: "common schools, and such high schools, normal schools, and technical schools as may hereafter be established." That section of the constitution continues as follows:

"But the entire revenue derived from the common school fund, and the state tax for common schools, shall be exclusively applied to the support of the common schools."

The framers of the constitution, had they desired, might in that section have included the university, but did not. Public schools are usually defined as schools established under the laws of the state, usually regulated in matters of detail by the local authorities in the various districts, towns, or counties, and maintained at the public expense by taxation, and open without charge to the children of all the residents of the town or other district. Black, Law Dictionary (2d ed.); *Jenkins v. Andover*, 103 Mass. 94; *Merrick v. Amherst*, 12 Allen 500. A school is "an institution of learning of a lower grade, below a college or a university. A place of primary instruction." Black's Law Dictionary (2d ed.).

In the state of Oklahoma, the constitution was apparently silent as to the university. It contained a provision similar to art. 3, § 22, of our constitution, art. 13, § 5, of the Oklahoma constitution providing:

"The supervision of instruction in the public schools shall be vested in a Board of Education, whose powers and duties shall be prescribed by law. The Superintendent of Public Instruction shall be president of the board. . . ."

After the adoption of the constitution, the board of education sought to exercise jurisdiction over the university of Oklahoma, which had existed prior to the adoption of the constitution under a territorial statute providing for its government by a board of regents. The supreme court of Oklahoma, in *Regents of University v. Board of Education*, 20 Okl. 809, 95 Pac. 429, concluded as follows:

"We are, therefore, irresistibly led, by both reason and authority, to the conclusion that the term 'public schools,' as used in section 5, art. 13, of the Constitution of Oklahoma, does not include in its meaning the University of Oklahoma, . . ."

There is a case cited by appellants, *State ex rel. Little v. Regents*, 55 Kan. 389, 40 Pac. 656, 29 L. R. A. 378, as sustaining their contention, but that case determined only the power of the board of regents to charge fees in the absence of statutory authority therefor. Here the statute expressly authorizes the board of regents to charge the fees. In *State ex rel. Priest v. Regents of University*, 54 Wis. 159, 11 N. W. 472, the constitution defined what should constitute the educational system of the state. A further provision required that, in district schools, tuition "shall be free and without charge for all children between the ages of four and twenty years." No restrictions as to fees or charges to be paid by students in academies, normal schools, or the university, or any of the colleges to be connected therewith were imposed by the constitution upon the law-making branch of the government. The supreme court, therefore, in that case, held that the state was left perfectly free and at liberty to regulate, control, or prohibit altogether such fees and charges by legislative enactment. This was based upon the familiar and well-established principle of constitutional law that, "The state legislature may exercise all legislative power not delegated to the general government, nor restricted nor reserved to the people by the state or national constitution."

We, therefore, conclude, upon reason and authority, that the contention of the appellants cannot be sustained. The matter of which they complain was committed solely to the discretion of the legislative body.

Nor is there any merit in their contention of illegal discrimination. It was within the legislative discretion to determine whether there was necessity or justification for the charge of entrance and tuition fees to students desiring to

attend the university while not requiring any such fees of students desiring to attend the State College of Washington at Pullman. Those attending the state college are not attending the state university. It is the universality of the operation of the law on all persons of the state similarly situated with reference to the subject-matter that determines its validity as a general and uniform law. *Cawsey v. Brickey*, 82 Wash. 653, 144 Pac. 938.

While we may, and do, greatly sympathize with the laudable and alleged desire of the appellants to obtain a higher education at the university, and with their lack of means and inability, as stated in their complaint, to comply with the law as it now exists, we are powerless. Their arguments, cogent as they are, should be addressed to the legislature and not to the courts.

Judgment affirmed.

MORRIS, C. J., MOUNT, BAUSMAN, and PARKER, JJ., concur.

[No. 13217. Department Two. March 7, 1916.]

SCHWABACHER HARDWARE COMPANY, *Respondent*, v. MILLER SAWMILL COMPANY, *Appellant*, FOSS BROTHERS & COMPANY, *Defendant*.[1]

BILLS AND NOTES — ACCEPTANCE — CONDITIONS — CONSTRUCTION — "AVAILABLE." Upon an acceptance of a bill of exchange, "payable out of proceeds of N. W. Fisheries Co. contract when same becomes available," the acceptor cannot, to the prejudice of the holder, apply proceeds subsequently received to discharge indebtedness owing the acceptor before the acceptance; since "avilable" means "at one's disposal," and the use of general terms in an acceptance without expressing any condition will not exempt from liability through particular facts which have already happened.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 28, 1915, upon findings

[1]Reported in 155 Pac. 767.

in favor of the plaintiff, in an action on a bill of exchange. Affirmed.

James Kiefer, for appellant.

Trefethen, Grinstead & Laube, for respondent.

BAUSMAN, J.—Foss, indebted to the hardware company, drew it a bill of exchange on the sawmill company, which accepted thus:

"Accepted payable out of proceeds of Northwestern Fisheries Co. contract when same becomes available."

The fisheries contract was one in which, supplying Foss with material, the sawmill company had become his creditor in a large amount, whence it contends, notwithstanding this acceptance, it had a right to repay this previous debt first out of subsequent receipts. In a word, "proceeds" meant *net* proceeds, and "available" *available to drawer* upon a whole accounting.

Foss was so embarrassed that the sawmill company was obliged to take over, through a new company, his entire business and complete the contract itself, and after the acceptance, various sums being received from the fisheries company, considerable was used in manufacture to make performance. About this portion the hardware company makes little contention. What it particularly objects to is the mill company's applying a certain remittance to the amount due on the indebtedness to the mill company owing before the acceptance. The lower court finding no communications between the parties from which to determine what was actually intended, and that the hardware company was not apprised that prior indebtedness existed or would be first paid, held that this use of that remittance violated the acceptance. Judgment was accordingly rendered for plaintiff.

In this the lower court was right. As for "available," that we can take only in its ordinary signification of "at one's disposal," since no trade definition is proved. Nor can we

say that the holder of a conditional acceptance gets no more rights than the drawer, for he gets what the acceptance says he gets, even if more, and when the acceptance is ambiguous, he gets what the court decides that the acceptance says. As to proceeds, some authors go so far as to say that, when one uses a vague term like that in situations like these, he will be held to have meant gross receipts from which even production expenses cannot be deducted, others that the term means net proceeds above production cost or current advances on the undertaking. Whichever of these two lines of decision is correct, there is no authority in either of them sufficient to justify us in extending the term so as to give not only production expenses, but past indebtedness, a priority over the acceptance.

As to this last situation, the best authority is against the acceptor. In *United States v. Bank of Metropolis*, 15 Pet. 377, 395, the supreme court of the United States held exactly against the acceptor's contention when the words of acceptance were "accepted on condition that his contract be complied with." Part of subsequent receipts was applied to extinguishment of prior balances against the drawer upon the very contract referred to, and this the court found a violation of the acceptance, saying:

"If one purpose making a conditional acceptance only, and commit that acceptance to writing, he should be careful to express the condition therein. He cannot use general terms and then exempt himself from liability by relying upon particular facts which have already happened, though they are connected with the condition expressed."

The reasons for the rule there laid down are fully amplified in that decision, which has never been disapproved by that court and has been frequently followed by others. *Coffman v. Campbell*, 87 Ill. 98, 101; *Seymour v. Lumber Co.*, 58 Fed. 958; *Posey v. Denver Nat. Bank*, 7 Colo. App. 108, 42 Pac. 684; *Greene v. Duncan*, 37 S. C. 239, 15 S. E. 956.

We find nothing in *Taylor v. Parish*, 86 Wash. 141, 149 Pac. 635, inconsistent with these views, and the judgment of the lower court is affirmed.

MORRIS, C. J., MAIN, HOLCOMB, and PARKER, JJ., concur.

[No. 13221. Department Two. March 7, 1916.]

CARSTENS PACKING COMPANY, *Respondent*, v. LEWIS C. TROUGHTON, INCORPORATED, *Appellant*, L. C. TROUGHTON *et al.*, *Defendants*.[1]

LANDLORD AND TENANT—JOINT LEASE—PARTIAL ABANDONMENT. The lessee of three markets under the same lease for one gross rental, may abandon one of the markets with the lessor's assent.

APPEAL—REVIEW—FINDINGS. A finding on directly contradictory statements will be sustained on appeal.

CORPORATIONS—REPRESENTATION—CONTRACTS BY OFFICER—RATIFICATION—LIABILITY. A twelve month's contract for advertising, made by the the manager of a packing company without previous authority, is ratified by the corporation, where, after notice of the contract, it permitted three or four monthly payments from its funds, it was receiving the benefits, and continued to make payments on the contract three months more; and an agreement to charge the same back to the manager is unfair and without consideration.

Appeal from a judgment of the superior court for King county, Smith, J., entered January 20, 1915, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Modified.

F. C. Kapp, for appellant.

Kerr & McCord, for respondent.

BAUSMAN, J.—The packing company became defendants' lessee of three markets under the same lease, for the same one-year period, and for one gross rental, for which reason it could not abandon one of the markets while keeping the others. However, it could do so and, according to the find-

[1]Reported in 155 Pac. 758.

ings of the lower court, did do so with defendants' assent. As to this last, there being directly contradictory statements, the finding against defendants must be sustained. There was testimony also to support the amount apportioned to the market released.

After delivering the markets, appellant, assuming to act as the packing company's temporary manager, made a twelve months' contract with a newspaper for advertising these stores. This was done without previous authority. On the other hand, the packing company's agents made the payments during several months before the head of that company perceived what they were doing. Here the latter, who might perhaps have repudiated the thing successfully, as between him and this manager, failed to do so, for he distinctly admits that, in order to "smooth relations" with appellant, he continued to permit three or four monthly payments from the packing company's funds. We must reject the finding of the lower court which charged this item to the appellant as both a fraud in its own interest and as a sum agreed by appellant to be charged back to it by the packing company. Nothing sustains the theory of fraud on the remote motive that the appellant, looking ahead a year, felt it would have these markets back at the end of that time the better for this advertising; and as to the agreement to let the packing company charge it back to the appellant, not only is this denied, but it seems unfair on the face of things and without consideration. In the first place, it was the packing company that had been getting the benefits of this advertising, was then getting it, and was still to get it at the time of this talk. In the second place, the packing company continued to make the payments about three months more. The law is quick to fasten ratification on a principal when he has both received benefits and has discovered the unauthorized act. He must repudiate wholly, finally, and at once.

The judgment is ordered to be modified, and the case is remanded to the lower court with instructions to enter a decree

in which the appellant will be relieved of the items of advertising set out in the fifth finding of fact.

MORRIS, C. J., MAIN, HOLCOMB, and PARKER, JJ., concur.

[No. 12949. Department Two. March 9, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v. E. F. ACKERMAN, *Appellant*.[1]

CRIMINAL LAW—TRIAL — MISCONDUCT OF ATTORNEY — CURE BY INSTRUCTIONS. In a prosecution for the forgery of a check connected with pay rolls said to be in the possession of the defendant and which were not produced, the declaration of the prosecuting attorney in argument to the jury that the pay rolls would have "convicted the accused absolutely," while improper, is not so prejudicial that it was not cured by an immediate instruction to the jury to disregard the remarks and warning the prosecutor to keep within the record.

Appeal from a judgment of the superior court for King county, French, J., entered December 2, 1914, upon a trial and conviction of forgery. Affirmed.

H. M. Dalton, for appellant.

Alfred H. Lundin and *Joseph A. Barto*, for respondent.

PARKER, J.—The defendant, E. F. Ackerman, was charged by information with the crime of forgery in the first degree. His trial in the superior court resulted in a verdict of guilty, and judgment being rendered thereon, he has appealed to this court.

It is contended in appellant's behalf that prejudicial error was committed against him by the prosecuting attorney in his argument to the jury. Appellant was charged with the uttering of a false and forged check which had some connection with certain pay rolls. Certain of these pay rolls were referred to by one of appellant's witnesses as being in possession of appellant, but these particular ones were not pro-

[1]Reported in 155 Pac. 743.

duced upon the trial. In his argument to the jury, the prosecuting attorney said: "These pay rolls were not produced, and if they had been produced they would have convicted defendant absolutely." Counsel for defendant immediately objected to these remarks of the prosecuting attorney, and the court promptly ruled thereon as follows: "Counsel is warned to keep within the record, and the jury is instructed to disregard and pay no attention to the remarks of counsel." These remarks of the prosecuting attorney seem to have been improper, but we do not think that they were such that their prejudicial effect was beyond cure by the instruction of the court relative thereto, which was promptly given to the jury. *Bunck v. McAulay*, 84 Wash. 473, 147 Pac. 33; *State v. Cavelero*, 89 Wash. 364, 154 Pac. 435.

Some contention is made in appellant's behalf rested upon remarks of the court made in the presence of the jury just prior to the receiving of the verdict by the court. These remarks, we regard so plainly free from error as to not call for discussion here.

We conclude that no prejudicial error is shown. The judgment is affirmed.

MORRIS, C. J., MAIN, HOLCOMB, and BAUSMAN, JJ., concur.

[No. 13241. Department Two. March 9, 1916.]

MAY N. HEUSTON, *Appellant*, v. KING COUNTY *et al.*, *Respondents*.[1]

TAXATION—ASSESSMENT—EXCESSIVENESS—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY. In an action to recover excessive taxes, the burden of showing that the assessment was so grossly in excess of its actual value as to constitute a constructive fraud or arbitrary action is upon the taxpayer, and requires evidence of the most clear and convincing character, and findings based on the presumption of proper valuation by the taxing board acting in a quasi judicial capacity will be sustained on appeal, although four witnesses of ordinary qualifications gave it as their opinion that the lands averaged about one-half of the assessed value.

SAME — EXCESSIVENESS — INEQUALITY — EVIDENCE — SUFFICIENCY. That tide lands on the main land are assessed in excess of other lands of like character cannot be shown by comparing the same with tide lands upon an island several miles distant on the other side of Puget Sound.

Appeal from a judgment of the superior court for King county, Jurey, J., entered November 3, 1915, in favor of the defendants, dismissing an action to recover money paid and to secure the reduction of a tax, tried to the court. Affirmed.

T. W. Hammond and *E. R. York*, for appellant.

Alfred H. Lundin and *Edwin C. Ewing*, for respondents.

PARKER, J.—The plaintiff, May N. Heuston, seeks recovery of sums paid by her as taxes to the treasurer of King county in excess of the amounts properly chargeable, as she claims, upon certain tide lands owned by her for the years 1910 to 1912, inclusive; and also to reduce the taxes upon other tide lands owned by her for the years 1911 to 1914, inclusive, all because of the alleged excessive valuation placed upon the lands for the purpose of taxation by the assessor of King county. Trial upon the merits in the superior court resulted in judgment denying the relief prayed for and the

[1]Reported in 155 Pac. 773.

dismissal of the action, from which the plaintiff has appealed to this court.

While appellant's complaint contains allegations of acts of the assessor amounting to actual fraud and arbitrary action on his part resulting in the claimed excessive valuation of her tide lands, these were not urged or relied upon at the trial. So we have here presented only the contentions (1) that the assessments upon the appellant's tide lands are so excessive, as compared with their actual value, as to constitute a constructive fraud upon her rights as a taxpayer, and (2) that the assessments upon her tide lands are so excessive, as compared with the assessment upon other tide lands of like character and situation, as to constitute a like fraud upon her rights. The questions presented are, in their final analysis, only questions of fact, depending for their answer upon the oral testimony of witnesses heard by the trial court.

Four witnesses testified on appellant's behalf touching the question of the value of appellant's lands. According to their opinions, the values of her lands averaged about one-half of the values fixed by the assessor. The qualification of each of these witnesses to give opinion testimony touching the value of the lands was challenged by counsel for respondent. Some of them did not, it seems to us, show qualifications of a very high order to give such opinion testimony, though we think the trial court correctly decided that their testimony was admissible. At the close of testimony offered in appellant's behalf, respondents rested and offered no testimony, relying upon the presumption of proper valuation by the assessor.

Counsel for appellant invoke the rule that the value of property for the purpose of taxation, as fixed and equalized by the county officers, may be so grossly in excess of its actual value as to constitute a constructive fraud upon the taxpayer such as to call for interference by a court of equity, as announced by this court in *Simpson Logging Co. v. Che-*

halis County, 80 Wash. 245, 141 Pac. 344, and prior decisions there cited. If the testimony given by the witnesses for appellant, to the effect that, in their opinion, the actual value of her tide lands was only one-half that fixed by the assessor, was such as to render it conclusive as establishing the value of appellant's tide lands, then it might be said that the trial court was bound to so regard this testimony and hold that the assessments worked a constructive fraud upon the rights of respondent. The burden of showing excessive valuation made by the assessor was upon the appellant, and to overthrow the correctness of his determination of values requires evidence of the most clear and convincing character before the court can say that there has been worked any constructive fraud upon appellant's rights as a taxpayer. The views of this court upon that subject are well stated in observations made in *Northern Pac. R. Co. v. Pierce County*, 55 Wash. 108, 104 Pac. 178, as follows:

"The circumstances under which the courts are authorized to interfere with an assessment of property made by the assessing officers has frequently been a subject for consideration by this court. In *Templeton v. Pierce County*, 25 Wash. 377, 65 Pac. 553, the decisions rendered prior to that time were summarized, and the principles governing the action of the court were restated. It was there said that fraud, capriciousness, or want of the exercise of an honest judgment on the part of the assessing officers was ground for interfering with the action of the officers, if the assessment made was grossly disproportionate to the value of the property assessed, or unequal when compared with the assessments on other property of like kind; but that mere overvaluation, unless the excess was so gross as to impute fraud on the part of the assessing officer, was not a ground for interference; that the assessor in placing valuations upon property acts in a *quasi* judicial capacity, and the law presumes that he has performed his duty in a proper manner; that this presumption is liberal, and the evidence to overthrow it must be clear. The same principles are enunciated in subsequent cases. *Miller v. Pierce County*, 28 Wash. 110, 68 Pac. 358;

Henderson v. Pierce County, 37 Wash. 201, 79 Pac. 617; *Dickson v. Kittitas County*, 42 Wash. 429, 84 Pac. 855."

These views are adhered to in *Hillman's Snohomish County Land & R. Co. v. Snohomish County*, 87 Wash. 58, 151 Pac. 96. We think it would be unprofitable to review the testimony of these witnesses in detail. We have painstakingly read all of the evidence as found in the statement of facts and conclude that, in view of the opportunity of the trial court to hear and see these witnesses, we should not now disturb the conclusions reached by the court.

Upon the question of the alleged excessive valuation of appellant's lands as compared with other lands of like character and situation, we cannot see our way clear to view the matter differently than as viewed by the trial court. The other lands claimed to be of a like character and situation were in fact several miles distant from the lands of appellant. They were upon Vashon Island in Puget Sound, while appellant's lands were upon the mainland on the east shore of the Sound, between the cities of Tacoma and Seattle. About the only respect in which these lands are similar is in their physical character. It is true that one might honestly believe, as some of the witnesses seem to have believed, that appellant's lands were less valuable than the Vashon Island lands, but we think there is equal room for honest belief on the part of the assessor to the contrary.

It seems quite plain to us that it cannot be said by us, not seeing or hearing these witnesses, that the testimony overcomes the presumption that the assessor did not act arbitrarily, capriciously or other than in the exercise of his honest judgment. There being no proof of wrong action on the part of the assessor, except such as would have to be inferred from this testimony touching the value of appellant's lands, we conclude that the judgment of the trial court should be affirmed. It is so ordered.

MORRIS, C. J., MOUNT, HOLCOMB, and BAUSMAN, JJ., concur.

[No. 13279. Department One. March 9, 1916.]

PEOPLES SAVINGS BANK, *Appellant*, v. FRANK BUFFORD *et al.*, *Respondents*.[1]

ADVERSE POSSESSION—HOSTILE ENTRY—MISTAKE—EVIDENCE—SUFFICIENCY. An entry upon a city lot in an outlying unsettled district by mistake, believing it to be another lot purchased, and partly clearing and fencing it and planting a garden, are not such acts as to put the true owner upon notice that the occupant was asserting a hostile claim, and not a mere trespasser; since title by adverse possession requires entry and occupation with hostile intent, which must be clearly demonstrated.

SAME—HOSTILE ENTRY—MISTAKE—RUNNING OF STATUTE. In such a case, the statute would not begin to run in favor of the occupant by mistake until he put the lot to the purposes for which it was intended when platted by erecting a house thereon; his earlier use not being inconsistent with a permissive use.

EQUITY—SEEKING AND DOING EQUITY—QUIETING TITLE — ADVERSE OCCUPANCY. Where both parties seek equitable relief in the quieting of title to a lot occupied adversely by the defendants by mistake for less than the statutory period, mistaking it for their own lot in the same addition, and the plaintiff, having the title and having paid taxes for ten years, had offered to exchange its lot, improved by defendants, for defendants' unimproved lot, the court will, upon the maxim that he who seeks equity must do equity, require defendants to make the offered exchange, or in the alternative at plaintiff's option, repay plaintiff all taxes and assessments it had paid upon its lot, occupied by defendants, from the time of defendants' entry to date.

Appeal from a judgment of the superior court for King county, Brawley, J., entered May 18, 1915, upon findings in favor of the defendants, in an action to quiet title, tried to the court. Reversed.

Kerr & McCord, for appellant.

McCafferty & Robinson, for respondents.

CHADWICK, J.—Since the 3d day of February, 1897, appellant has been the owner of lot five, in block ten, in Armour's addition to the city of Seattle. On the 11th day of

[1]Reported in 155 Pac. 1068.

September, 1903, one Kellog, being the owner, conveyed to respondents lot five, in block seven, in Armour's addition. Kellog went upon the ground with respondents and undertook to point out the boundaries of lot five in block seven. As a matter of fact, he pointed out lot five in block ten. Very soon thereafter, respondents slashed off a part of the brush, put a fence around three sides of the lot, and sowed some turnips. They did some clearing from time to time thereafter, and also some grading. The record is not entirely clear as to the time when the grading was done. It is reasonably clear, however, that the lot was used to a greater or less extent as a garden from the time respondents took possession up to the summer of 1907, when respondents built a five-room house upon it at a cost of about $1,200. At the time respondents purchased from Kellog, Armour's addition was in an outlying district, ungraded, unimproved, and but sparsely settled.

Appellant paid the taxes on lot five in block ten from year to year, including all special assessments. Respondents paid the taxes and special assessments on lot five in block seven. The tax notice for 1913 showing a tax for improvements, an agent of the appellant went out to see the property, and found the lot owned by it improved and occupied by respondents. He notified respondents that they were in possession of a lot owned by appellant. This seems to have been the first time that respondents had any notice or knowledge of the fact that they were not on the lot which they had purchased.

Failing to agree upon terms of settlement, appellant brought this action, praying for the possession of lot five in block ten, and that the title thereto be quieted, and for equitable relief. Respondents set up the statute of limitations, praying that the complaint be dismissed, and by amendment upon the trial, that their title be quieted.

Another fact, not very material, but indicative of the good faith of the parties, is that, at the time respondents built

their house, they put a mortgage upon it describing the property as lot five in block seven. The relation of the parties may be quickly summed up by reference to the memorandum of the trial judge:

"The only difference being that one was in possession of the property improving it, while the other was simply carrying it upon its books paying the taxes and giving no further attention to the property."

Upon the authority of *McCormick v. Sorenson*, 58 Wash. 107, 107 Pac. 1055, 137 Am. St. 1047, a decree was entered in favor of the respondents.

But it is not every possession that will start the running of the statute. There is a presumption attending always that one who enters into the possession of the property of another enters with the permission of the true owner, and holds in subordination to his title. The statute begins to run from the date of possession only when it is sustained by a hostile intent to claim adversely, or, where possession is taken by mistake, the intruder exercises such dominion over the property as to put the true owner upon notice of the hostile claim. As is said in the books:

"The disseisor 'must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest.'" 1 R. C. L. 693.

In other words, a title by adverse possession, where land is claimed under mistake, "cannot be decided as a matter of law, without resort to the facts of the particular case." *Johnson v. Ingram*, 63 Wash. 554, 115 Pac. 1073. The claim must be followed by acts which clearly evince a determination of permanent ownership. *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936.

Where one enters upon land under a claim of right arising in or out of the chain of title, or under color of title, the entry is sufficient to start the running of the statute. But where one enters with the permission of the true owner—and

one who enters by mistake having no intention to claim that which is not within the calls of his deed is upon no higher plane—the statute will not begin to run until the record owner has actual notice, or the land is put to such uses as to put him upon notice that the occupant is not a mere trespasser, but is asserting a hostile claim.

The presumption that one entering upon the property of another does so in subordination to the title of the real owner is a valuable right of property. The disseisor is put to the burden of proof (*Skansi v. Novak*, 84 Wash. 39, 146 Pac. 160) and the title is not to be overcome by evidence of entry and occupation alone, but the hostile intent must be clearly demonstrated, that is to say:

" 'Regard must be had to the nature or quality of the acts, and to the situation of the property, as well as to the theory upon which the doctrine of adverse possession rests . . .'

"The circumstances of possession must be of such nature as to preclude a conclusion that the owner was misled by facts from which he might reasonably have supposed a mere trespass had been or was being committed, instead of the assertion of a claim of right. The acts of the invader are sufficient if they clearly show actual appropriation to his permanent and exclusive dominion and benefit; but they must visibly indicate intention of permanent occupation and appropriation. Actual residence on the land, however, is not necessary." *Sinclair v. Matter*, 125 Minn. 484, 147 N. W. 655.

"There is no fixed rule whereby the actual possession of real property by an adverse claimant may be determined in all cases." 1 R. C. L. 693.

Wherefore, as is said in *Bowers v. Ledgerwood*, *supra*, we must resort to the facts and circumstances of the instant case. The parties each had title to a specific town lot. There was no intention on the part of respondents to enter upon or claim appellant's property. They entered on the lot now occupied by mistake. Up to that time the rights of the parties were equal, for we cannot bring ourselves to hold that there is a greater duty upon the holder of an unim-

proved town lot to patrol his property than there is upon a purchaser of a lot in an unimproved wooded district, to ascertain, by resort to exact and proper measurements, the true boundaries of his lot. It is always an important inquiry in this class of cases to consider the character and intended uses of the property. It would seem that the mere fencing and sowing of some turnip seed were insufficient to initiate a title to a town lot. It is not like land that may be pastured or put to commercial crops or from which wood may be cut. Such acts are not inconsistent with an intent to trespass, for few owners would object to the use of his unimproved town lot by those who might plant a garden, erect a chicken run, or pile wood upon it. Town lots are laid out for the purpose of erecting dwellings and convenient outbuildings, and the title to them should not be disturbed until there is clear proof that the occupant intends to devote the property to the uses for which it was intended.

Respondents did nothing that was not consistent with permissive use, or the act of a trespasser, until in 1907, when they built the house they now occupy, and their right to claim by adverse possession would not antedate that time. This holding is not inconsistent with the holding of the court in *McCormick v. Sorenson, supra.* It is not clearly stated in the opinion, but reference to the statement of facts will show that lots were bought by Sorenson's predecessor in 1892; that he entered upon the property of another by mistake in 1892, and either in 1892 or 1893, fenced the lots, planted fruit trees, and erected a dwelling house. He raised his flag. He put the lots to the uses intended by those who had platted and put them on the market.

Both parties have asked for equitable relief. Each of them have asked that their title be quieted in lot five in block ten. At the beginning of the trial, appellant offered to make a deed to respondents for lot five in block ten in consideration of a deed to lot five in block seven. The first maxim in equity is: *He who seeks equity must do equity.* Considering

that each party was acting in entire good faith, and each party has paid taxes upon their record titles during all these years; and that no claim was made to both lots by respondents until after the ten-year period after the first possession had run, we think it would be inequitable to permit appellant to oust respondents, or to permit respondents to refuse to either deed lot five in block seven or to reimburse appellant for the taxes it has paid upon the lot upon which they have erected their home. Equity will not give respondents more than they could have claimed at law if the mistake had been discovered in time to bring an action of ejectment.

Wherefore we have decided to compel respondents to do that which, in good conscience, they should have done in the beginning. As the mortgagee, if the mortgage is still unpaid, can assert a lien in equity upon lot five in block ten, our judgment is that appellant may elect whether it will take a deed to lot five in block seven to be executed by respondents, conveying all their right, title and interest in and to said lot free of all liens and incumbrances created or suffered by them, or, if appellant does not desire to take title to the said lot, the respondents shall reimburse appellant for all taxes and assessments paid out by it on lot five in block ten from the time of the entry of respondents until the present time.

Appellant will give notice of its election within thirty days after the remittitur goes down, and respondents will, within thirty days thereafter, execute the deed or pay the amount of the taxes as appellant may elect. If respondents refuse to convey, the court will appoint a commissioner to make the deed.

Remanded with instructions to execute this decree.

MORRIS, C. J., MOUNT, and ELLIS, JJ., concur.

[No. 13222. Department One. March 9, 1916.]

EAST HOQUIAM COMPANY *et al.*, *Appellants*, v. THE CITY OF HOQUIAM, *Respondent*, GRAYS HARBOR CONSTRUCTION COMPANY, *Intervener*.[1]

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS — REASSESSMENT —STATUTES—RETROACTIVE EFFECT. Laws 1915, p. 526, amending 3 Rem. & Bal. Code, § 7892-12, so as to limit assessments for local improvements in certain cities in case the estimated costs of the improvement exceeds fifty per cent of the assessed valuation of the property, has no retroactive effect and does not apply to a reassessment made after the passage of the act, where the improvement was initiated, the contract let, the work completed, the original assessment levied, and the special benefit conferred prior to the passage of the act.

JUDGMENT—RES JUDICATA—MATTERS CONCLUDED. A judgment setting aside a local improvement assessment as made upon a fundamentally wrong basis, and as in excess of the benefits derived and in excess of the assessed valuation, is not *res judicata* and conclusive that the assessed valuation was the limit of the special benefits, although in a memorandum opinion the court expressed the opinion that the assessment was void because it exceeded the assessed valuation.

MUNICIPAL CORPORATIONS — SPECIAL ASSESSMENTS — BENEFITS—LIMIT—VALUATION FOR TAXATION. The fact that the entire assessment for a local improvement exceeded the valuation of all the property in the district for general taxation does not tend to show that the assessments exceed the special benefits conferred on the entire district or the property assessed; there being no relation between the benefits and general taxation valuations.

JUDGMENT—MATTERS CONCLUDED—ASSESSMENTS — VACATION — REASSESSMENTS. Any provision in a judgment vacating an assessment attempting to fix a limit to the power to reassess specific tracts, other than the natural limit of cost apportioned to the benefits, is beyond any legal issue and not binding on the supreme court on appeal.

SAME—MATTERS CONCLUDED—SPECIAL BENEFITS—REASSESSMENTS. A judgment vacating an assessment for a local improvement upon a finding that specific tracts were assessed in excess of the benefits conferred, is *res judicata* and binding upon the city and a bar to a reassessment of the same tracts for the same improvement in the same or greater amounts.

[1]Reported in 155 Pac. 754.

Appeal from a judgment of the superior court for Grays Harbor county, Irwin, J., entered September 15, 1915, confirming an assessment roll, upon appeal from the city commission. Reversed.

Morgan & Brewer and *Frank C. Owings*, for appellants.

Sidney Moor Heath, *Geo. D. Abel*, and *W. H. Abel*, for respondent and intervener.

ELLIS, J.—This is an appeal from a judgment affirming the order confirming a reassessment roll prepared by the city commission of Hoquiam, a city of the second class, reassessing, among others, certain lands belonging to the appellants. A former assessment was set aside by the superior court upon the grounds that the assessment had been made upon a fundamentally wrong basis and that the property of these appellants had been assessed in excess of the benefits. On the appeal to the superior court from the reassessment roll, the appellants introduced no evidence on the question of benefits, save the record on the first appeal containing the court's findings of fact, conclusions of law and judgment. It was stipulated that the assessed valuation for general taxation of all the property in the district for the year 1914 was $23,565. The improvement had been completed and accepted and the original assessment had been held invalid prior to the enactment of chapter 168 of the Laws of 1915, p. 526, amending 3 Rem. & Bal. Code, § 7892-12, relating to the limit of assessments. That amendment went into effect shortly prior to the approval of the reassessment roll by the city commission. The questions presented are largely of first impression and require full consideration.

I. Appellants first contend that the reassessment is invalid in that its total exceeds fifty per cent of the assessed valuation for general taxation of all the property in the district. The aggregate of the reassessment for the entire district was $17,380. Fifty per cent of the assessed valuation

at the time the reassessment was made was $11,782.50. The amendment of 1915, so far as here material, reads as follows:

"The council shall have jurisdiction to proceed with any such improvement initiated by petition or resolution: *Provided*, That in any city of the first class *or city organized and existing under the commission form of government provided for in chapter 116 of the Laws of 1911*, it appears from the certificate of the board, officer, or authority designated by charter or ordinance to determine the same that *the proportion of* the estimated cost and expense thereof *to be assessed against the property in the proposed improvement district* does not exceed fifty per cent (50%) of the valuation of the real estate, exclusive of improvements thereon, within such district, according to the valuation last placed upon it for purposes of general taxation: *Provided*, That this limit may be exceeded when any such improvement shall be petitioned for in the manner provided in section 7892-9 of Rem. & Bal. Code, and such petition shall be signed by the owners of *sixty (60%) per cent of the lineal frontage upon the improvement to be made and three-fourths of* the area within the limits of the proposed improvement district, and shall specify a certain higher percentage up to which the property within such proposed improvement district may be assessed: *Provided, further, That the jurisdiction of the council or other legislative authority to proceed with any such improvement initiated by resolution shall be divested by a protest filed with the council prior to the awarding of the contract for such improvement signed by the owners of three-fourths of the area within the limits of the proposed improvement district.*"

We have italicized the parts added to the original section by the amendment. Appellants' argument under this first head is based upon the claim that, in making the reassessment, the city commission was bound by the limitation as it existed at the time the reassessment was made. Section 7892-42 of 3 Rem. & Bal. Code is cited in support of this claim. That section provides that every assessment shall be made in accordance with the provisions of law and ordinances existing at the time of its levy. The argument is specious. It begs the question. It assumes that the amendment of

1915, which for the first time imposed any limitation, save that of actual cost and special benefits, upon the power of cities other than of the first class, to assess or reassess, is retroactive and is intended to apply to improvements theretofore initiated and completed. The amended section is, however, clearly prospective in its terms. The very first clause indicates that it shall not apply to improvements theretofore made, since it authorizes the council to *proceed* with improvements initiated by petition or resolution. Obviously this language, which indicates the purview of the whole section, can have no application to an improvement already completed. It would be idle to authorize the council to proceed with a thing already performed. The section throughout negatives the idea of a retroactive intention. It is made to apply to a "proposed improvement district." It contemplates a preliminary estimate of the cost of the improvement. Manifestly, such an estimate would be an idle formality as to an improvement made long prior to the passage of the act. After the improvement has been made, the cost is no longer a matter of estimate, but an actuality.

If any doubt could exist as to the purely prospective intention of this section, that doubt is removed by the last proviso added by the amendment, which declares that the jurisdiction to proceed with the improvement shall be divested by a protest filed with the council "prior to the awarding of the contract for such improvement," etc. It is too clear for cavil that this section cannot apply to any improvement not only initiated prior to its passage, but for which the contract had been awarded and performed by the making and acceptance of the improvement. Suppose that the improvement here in question had been completed, as it was, prior to the enactment of this amendment, but that the original assessment roll had not been made until after that enactment. We apprehend that no one would seriously contend that, in such a case, the fifty per cent limit fixed by this amendment would have any application. The case supposed is in no

sense different from the case before us. It is true that the original assessment was made prior to the passage of the amendment applying the fifty per cent limit to cities other than of the first class, but it is also true that that assessment was set aside and the reassessment was made to pay for the same improvement. We find it unnecessary to enter at length into the invited discussion as to the constitutional power of the legislature to have made this limitation retroactive, since, even assuming the power, it has not done so. The city having initiated this improvement, let the contract, completed the work and accepted the benefit, has the right to levy an assessment for the full cost of the work, up to the limit of the special benefits conferred, to pay for it. We cannot blink the fact that the other view would be to countenance an enforced repudiation of a moral obligation legally incurred. *People ex rel. Whitley v. Common Council of Lansing*, 27 Mich. 130. That the legislature ever intended such a result will not be assumed, in the absence of a specific declaration to that effect.

II. It is next asserted that, in setting aside the first assessment, the trial court found the assessed valuation to be the limit of the special benefits to the property in the district as a matter of fact. It is argued that this is *res judicata*, and that there can, therefore, be no reassessment on the entire district in excess of the assessed valuation for general taxation of the property within the district at the time the finding was made. This position is unsound for two reasons. In the first place, the court made no such finding. It is true that, in his memorandum decision in the first case, the learned trial judge expressed the opinion that the fact that the cost of the improvement exceeded the assessed valuation of the property in the district was ground for holding the assessment void, but he did not carry that view into his findings of fact or conclusions of law. His findings, so far as here material, were (1) that the cost of the improvement, as fixed by the preliminary estimate, was $17,279.97; (2) that the

assessed valuation for general taxation of the property within the district at the time the improvement was made was $13,685; (3) that the assessment was made upon a fundamentally wrong basis, in that some of the property was assessed upon a front-foot basis and some upon a square-foot basis, and for other reasons foreign to the question of assessed valuation; and (4) that specifically described properties of the appellants were assessed in specific sums which were in excess of the benefits. He then concluded, as a matter of law, that the assessments as to these properties should be set aside as "made upon a fundamentally wrong basis" and "in excess of the benefits derived." There is nothing in all of this adopting, as a matter of fact, the assessed valuation for taxation as the limit of actual benefits. It is true, also, that the judgment recites that the assessments are set aside as having been "made upon a fundamentally wrong basis" and as "being in excess of benefits derived and in excess of the assessed valuation of the property involved." But this is neither a finding nor an adjudication that the actual benefits derived to the whole district did not in fact exceed the assessed valuation of all the property in the district. Even assuming, therefore, that the finding supposed would have been *res judicata*, appellant's argument fails for lack of a minor premise, since no such finding was made.

In the second place, there is no natural or logical relation between the benefits to property derived from a given improvement and the assessed valuation of that property for the purpose of general taxation. The finding that the entire assessment for the local improvement exceeded the valuation of all the property in the district for general taxation, which was the finding actually made, had no logical tendency to show that the special assessment exceeded the special benefits conferred, either on the entire district or on any specific property therein. Had the court actually made a finding that the assessment was void because it exceeded the valua-

tion for the purpose of taxation and based his judgment vacating the first assessment on that alone, the judgment would have been a palpable *non-sequitur* from the finding and void on its face, since in the absence of a legislative declaration to that effect, such a finding would be no ground for the vacation of the assessment, and certainly not *res judicata* in a proceeding to reassess based upon actual cost and special benefits. In the absence of a statutory limitation, any provision in a judgment vacating an assessment, attempting to fix a limit to the power to reassess specific tracts in the district other than the natural limit of cost proportioned to benefits conferred, is *brutum fulmen*, because beyond any issue legally cognizable by the court. A judgment purporting to impose such a limit, though unappealed from or even affirmed on appeal, will not be binding on this court on an appeal from a reassessment. The courts have no power to so embarrass the city in making a reassessment. Such is the logical trend of our own decisions. *Johnson v. Seattle*, 53 Wash. 564, 102 Pac. 448; *Allen v. Bellingham*, 77 Wash. 469, 137 Pac. 1016; *State ex rel. Hindley v. Superior Court*, 82 Wash. 37, 143 Pac. 455; *Inner-Circle Property Co. v. Seattle*, 69 Wash. 508, 125 Pac. 970; *Lester v. Seattle*, 42 Wash. 539, 85 Pac. 14; *Ryan v. Sumner*, 17 Wash. 228, 49 Pac. 487.

Any other rule would make the power to reassess for benefits conferred a mere matter of grace to be accorded by the courts, rather than a matter of right as declared by the statute. The legislature alone has the power to declare a limit other than the natural limit of actual cost and special benefits, which is the limit impliedly recognized by the constitution. Const., art. 7, § 9. It is, of course, admitted that there was no such limitation as to cities of the class here involved at the time the first assessment was set aside. The amendment of 1915, as we have seen, is not retroactive. The finding, therefore, that the assessment exceeded the assessed valuation for general taxation is not *res judicata* of

the right to reassess the entire district or any specific property therein in excess of the assessed valuation.

III. Finally, it is contended that the finding of the trial court in setting aside the first assessment, that it exceeded the benefits to the appellants' properties, is *res judicata* of the question of benefits. In the first proceeding, the court found that the assessment upon some thirty-four pieces of the appellants' properties exceeded the benefits derived by those properties from the improvment "by a considerable." In the court's finding were set out the specific descriptions of those properties and the amounts assessed against each which were found excessive. In the reassessment roll, which is now before us, these same properties are included, and all of them, save seven, are assessed in amounts larger than in the original roll. Three additional properties belonging to the appellants are included and assessed in the reassessment roll. It is urged that the city commission had no power to reassess these same properties for the same improvement except in sums materially less than the amounts held on the first appeal excessive of benefits.

The appellants invoke the broad general rule that, in an action between the same parties, a judgment is *res judicata* of all matters in issue and all matters that might have been raised and adjudicated. Obviously, that rule cannot be applied as between an original assessment and a reassessment without rendering the statute authorizing a reassessment nugatory. The subject-matter of the first contest was the origial assessment roll, that of the second contest, the roll on reassessment. *Shepherd v. Kansas City*, 81 Kan. 369, 105 Pac. 531.

An order or judgment directing the recasting or modification of an original assessment roll is, of course, *res judicata* of the thing ordered in all subsequent litigation *touching that roll*, but a judgment annulling or setting aside an original roll in whole or in part and leaving it to the determination of the city authorities whether a reassessment or supplemental

assessment shall be made in pursuance of their statutory power, in the very nature of the thing can be *res judicata* only as to the invalidity of the first roll, except where that judgment, on a proper issue formed, has finally and specifically determined the one thing which must inhere in any valid assessment, namely, the special benefits to given property. 2 Page & Jones, Taxation by Assessment, § 991; *Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578.

As said in *Johnson v. Seattle, supra:*

"The cases brought under the old assessment above referred to are not *res judicata*, for the reason that the old assessment is superseded by the reassessment. Those cases had reference to the old assessment, and were *res judicata* as to the questions raised therein; but they are not so as to the reassessment, further than a payment under the old assessment becomes by the ordinance a payment *pro tanto* under the reassessment. The assessment is identical with the red figures in the old assessment, and appears to be a fair assessment for benefits received by the property in the district. It is not claimed that the property improved has not received benefits to the amount of the reassessment."

The cases referred to in the above quotation are *State ex rel. Barber Asphalt Pav. Co. v. Seattle*, 42 Wash. 370, 85 Pac. 11, and *Lester v. Seattle, supra.* In the first of those cases, it was adjudged that a part of the assessment, spread without notice upon a sixty-foot strip additional to the strip of one hundred twenty feet abutting the improvement, which alone was included in the notice of assessment, was void for lack of notice, but the power of the city to make a reassessment for the cost of the work was recognized, and the right of the contractor to compel an exercise of that power by the city was declared.

In the *Johnson* case, above quoted, the prior judgment was held not *res judicata* precluding the right of the city on proper notice to reassess the same property in precisely the same amounts as in the original void assessment; this, obviously, because the question of benefits was not determined

in the first judgment: See, also, the other decisions of this court hereinbefore cited to the same effect. But where, as in the case before us, in the first judgment it was adjudicated on a proper issue that the specific property is not benefited by the improvement in excess of a given sum, or that an assessment in a given sum on specific property exceeds the special benefits to that property, a different question is presented. It is obvious that such a judgment determines a question of fact between the same parties, which, in the absence of changed conditions, remains the same regardless of the particular proceeding in which the same fact becomes an issue. *Schuchard v. Seattle*, 51 Wash. 41, 97 Pac. 1106. The first judgment is, therefore, necessarily *res judicata* as to that fact between the same parties on a reassessment. Otherwise, a judgment setting aside an assessment on specific property on the sole ground that the assessment exceeded the benefits to that property would be an idle form, since the city could reassess the property in the same sum *ad infinitum*. Taxation by special assessment is defensible only upon the theory of corresponding special benefits to the property assessed. Const., art. 7, § 9. That is the sole moral basis of the right to reassess where the first assessment has failed for any reason other than the lack of special benefits to the property assessed. *Freeport St. R. Co. v. Freeport*, 151 Ill. 451, 38 N. E. 137; *In re Shilshole Avenue*, 85 Wash. 522, 148 Pac. 781; *Seattle v. Kelleher*, 195 U. S. 351.

But where it is once determined by a court of competent jurisdiction, in an action between the city and the property owner, that given property cannot be benefited by an improvement as much as a given sum, the moral right, and hence the legal authority, to reassess for that sum or a greater sum does not exist. Such a judgment goes to the very ground-work or basis of any assessment. *Greeley v. Town of Cicero*, 148 Ill. 632, 36 N. E. 603; *Town of Cicero*

v. Green, 211 Ill. 241, 71 N. E. 884. It is true that we said in the case of *Inner-Circle Property Co. v. Seattle, supra:*

"In a reassessment proceeding, the questions of benefits and apportionment thereof are as much original questions as they are in the original assessment proceeding."

Language equally broad is found in our decisions in *Allen v. Bellingham, State ex rel. Hindley v. Superior Court*, and *Johnson v. Seattle, supra;* but in none of these cases did it appear that the judgment annulling the first assessment contained any adjudication that the specific property involved was not specially benefited by the improvement in a sum equal to or greater than the amount of the first assessment. The question here under consideration was not involved in any of those cases. The language there used must, therefore, be construed as applying to judgments based on other grounds, touching which, as we have seen, it is strictly accurate.

In the case before us, the judgment on the first roll having determined that the specific assessments against the appellants' properties in that roll exceeded the benefits to those properties, finally determined that question and was binding upon the city, precluding it from assessing the same properties in the same or greater amounts.

We do not hold that a finding of no benefits, or of benefits less than a given amount, would be *res judicata* where, before the reassessment, a defective improvement has been changed, or for any other reason the relation of the improvement to specific property has been altered, so as to lay the foundation for evidence that property not originally benefited has received an actual physical benefit, or that property originally benefited in a certain amount has received an increased benefit. On such a case, we express no opinion.

On the facts before us we conclude (1) that a new assessment should be made on all property benefited for the reasonable value of the improvement, which, in the absence of proof to the contrary, is its actual cost, unlimited by the amount

of the valuation of the property in the district for general taxation, either at the time the improvement was made or at the time of the new assessment; and (2) that the new assessment on each of the appellants' lots shall be substantially less than the trial court found to be excessive of benefits in the first proceeding.

Reversed and remanded for further proceedings.

MORRIS, C. J., MOUNT, and FULLERTON, JJ., concur.

CHADWICK, J., concurs in the result.

[No. 12932. Department Two. March 11, 1916.]

PEERLESS PACIFIC COMPANY, *Respondent*, v. E. BURCKHARD, *Appellant*[1]

MARRIAGE — REMARRIAGE AFTER DIVORCE — VALIDITY. A marriage within the six months prohibited by the divorce, outside the jurisdiction, where the parties went for that purpose and immediately returning without intent to change their domicile, is void and the issue is not legitimate.

EXEMPTIONS — "HEAD OF FAMILY" — "HOUSEHOLDER" — "CHILD" — STATUTES. A man living on the premises with his illegitimate minor child cannot claim a homestead exemption as the head of a family or a householder, within Rem. & Bal. Code, §§ 553 and 565, defining the head of a family and a householder as every person who has . . . his minor child residing with him or under his care and maintenance.

EXEMPTIONS—INSURANCE MONEY—TIME OF FIRE—HOMESTEAD SUBSEQUENTLY PERFECTED. Where the right to claim a homestead exemption in a house destroyed by fire did not exist at the time of the fire, an exemption in the insurance money cannot be claimed, although a homestead exemption was thereafter perfected before the trial in an action garnisheeing the insurance money; in view of Rem. & Bal. Code, § 568, which exempts insurance money only "whenever property which by the laws of the state is exempt from execution or attachment, is insured and is destroyed by fire" etc.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered February 1, 1915, in favor

[1]Reported in 155 Pac. 1037.

of the plaintiff, in garnishment proceedings, tried to the court. Affirmed.

A. Emerson Cross, for appellant.

T. H. McKay, for respondent.

MAIN, J.—This action involves the question of exemptions.

The material facts may be briefly stated as follows: On May 3, 1913, E. Burckhard was divorced from his then wife by a decree of the superior court for Chehalis county. On June 30, 1913, Burckhard purchased certain lots or tracts of land in Aberdeen, Washington, on contract. On August 25, 1913, and within six months after the divorce decree was entered, Burckhard and Elsie Warwick were married at Westminster, British Columbia. Prior to this marriage, Burckhard had been engaged in the plumbing business in Aberdeen, and on the day following the marriage, the parties thereto returned to Aberdeen, where Burckhard continued his plumbing business. They went to Westminster for the sole purpose of being married, expecting immediately to return to Aberdeen.

On or about October 1, 1913, Burckhard and wife entered into possession of the real estate which he had purchased, and occupied the house erected thereon. The house and household goods were insured under a policy issued by the Girard Fire Insurance Company. On April 18, 1914, the Peerless Pacific Company recovered a judgment against Burckhard in the sum of $432.19. On or about the 28th day of April, 1914, the dwelling house and a portion of the household goods were damaged by fire. On May 1, 1914, the Peerless Pacific Company caused a writ of garnishment to be issued and served upon the insurance company, the purpose of this garnishment being to reach the money due from the insurance company to Burckhard by reason of the fire. On July 2, 1914, Burckhard remarried Elsie Burck-

hard at Aberdeen, Washington. On July 7, 1914, Burckhard filed a declaration of homestead upon the real estate. Thereafter he intervened in the garnishment proceeding and claimed the proceeds of the insurance as exempt.

Prior to the date of the fire, a child was born as a result of the union occasioned by the marriage ceremony performed at Westminster, British Columbia. After the issues had been framed upon the complaint in intervention, the case came on for trial on November 27, 1914, and resulted in a judgment sustaining the garnishment and denying the right of Burckhard to exemptions. From that judgment, Burckhard appeals.

From the facts stated, it appears that, prior to the time the fire occurred, Burckhard, his wife, and child, by virtue of the Canadian marriage, were residing together, using the property which was damaged or destroyed by fire. After the writ of garnishment had been served, and prior to the time when the case came on for trial, another marriage ceremony was performed about the validity of which there is no question.

The first question is whether Burckhard, at the time the fire occurred, was entitled to a homestead, and personal property exemptions, as the head of a family. The parties having gone out of this jurisdiction for the sole purpose of having a marriage ceremony performed, and immediately thereafter returning, having had no intention of changing their domicile, the marriage ceremony thus performed is in law void, and the issue of such marriage is not legitimate. *State v. Fenn*, 47 Wash. 561, 92 Pac. 417, 17 L. R. A. (N. S.) 800; *Pierce v. Pierce*, 58 Wash. 622, 109 Pac. 45. This proposition, apparently, is not seriously controverted.

But it is contended that Burckhard was the head of a family, or a householder, notwithstanding the void marriage, because he had residing with him his minor child. Section 553, Rem. & Bal. Code (P. C. 223 § 49) defines the head of a family, so far as here material, as being:

"Every person who has residing on the premises with him or her, and under his or her care and maintenance . . . his or her minor child . . ."

Section 565 (P. C. 81 § 877) defines a householder as:

"Every person who has residing with him or her, and under his or her care and maintenance, . . . his or her minor child . . ."

The question then is whether the word "child," as used in these statutes, includes a child not legitimate. If it does, then Burckhard was a householder and the head of a family, and was entitled to exemptions, as he was living with and supporting the child and its mother. Where the word child or children is used in a statute, without qualifying words, and where the context does not show a contrary meaning, the general, if not the universal construction, is that the word child or children does not include an illegitimate child. 7 Cyc. 125; *Robinson v. Georgia R. & B. Co.*, 117 Ga. 168, 43 S. E. 452, 97 Am. St. 156, 60 L. R. A. 555; *Overseers of Poor of Forest City v. Overseers of Poor of Damascus*, 176 Pa. St. 116, 34 Atl. 351; *Hayworth v. Williams*, 102 Tex. 308, 116 S. W. 43, 132 Am. St. 879; *McDonald v. Pittsburgh, C. C. & St. L. R. Co.*, 144 Ind. 459, 43 N. E. 447, 55 Am. St. 185, 32 L. R. A. 309; *Alabama & Vicksburg R. Co. v. Williams*, 78 Miss. 209, 28 South. 853, 84 Am. St. 624, 51 L. R. A. 836. Other authorities to the same effect might be cited. In the statutes above referred to, the word child is used without qualification; and there is nothing in the context which would indicate that the legislature intended to broaden its meaning. It follows, therefore, that Burckhard was not the head of a family, or householder, by reason of the fact that he was living with and maintaining the child.

Our attention has been called to the case of *In re Gorkow's Estate*, 20 Wash. 563, 56 Pac. 385. But that case arose under the statutes of descent and is not applicable here. Section 1345, Rem. & Bal. Code (P. C. 409 § 643) under

the chapter headed "Descent," provides that illegitimate children may be considered as heirs under the conditions named in the statute. This case does not meet the conditions there named.

Some authorities have been cited from other jurisdictions where a father, living with and supporting his illegitimate child, has been held to constitute the head of a family. But the states in which those cases arose did not have statutes which defined, as in this state, what is meant by "householder" or "head of a family." The exemption ran to the family, and the question became one for the courts to determine what constituted a family relation. The legislature in this state having defined the terms, this court must accept the definition thus prescribed.

It is contended, however, that, notwithstanding the fact that Burckhard may not have been the head of a family or a householder at the time of the fire, he became such by reason of his subsequent valid marriage, which occurred prior to the time the case was tried in the superior court. In other words, the contention is that, even though Burckhard was not the head of a family or a householder at the time of the fire, and at the time the writ of garnishment was served, he became such prior to the time of the entry of the judgment, and that the question should be resolved as of the date of the judgment.

The right to claim moneys due from an insurance company by reason of a fire, as exempt, is derived from Rem. & Bal. Code, § 568 (P. C. 81 § 879) which provides:

"Whenever property, which by the laws of this state is exempt from execution or attachment, is insured and the same is destroyed by fire, then the insurance money coming to or belonging to the person thus insured, to an amount equal to the exempt property thus destroyed, shall be exempt from execution and attachment."

Under this statute, insurance money coming to the insured is exempt "whenever property which by the laws of this state

is exempt from execution or attachment is insured and the same is destroyed by fire." In this case, property which was exempt was not insured. Neither was it destroyed by fire, because, up to and including the time when the fire occurred, Burckhard was not the head of a family or a householder. To hold that the insurance money was made exempt because Burckhard became the head of a family and a householder subsequent to the fire and prior to the time of the trial, it would be necessary to read into the statute a provision to the effect that if property is insured which is not exempt and is damaged and destroyed by fire, and if the fire had not occurred the property would have been exempt at the time of the trial, then the insurance money shall be exempt. To so construe the statute would be legislation, and not judicial construction.

The judgment will be affirmed.

MORRIS, C. J., HOLCOMB, PARKER, and MOUNT, JJ., concur.

[No. 12944. Department Two. March 11, 1916.]

DU PONT DE NEMOURS POWDER COMPANY, *Respondent*, v. NATIONAL SURETY COMPANY, *Appellant*.[1]

RAILROADS—CONSTRUCTION—LIENS — BOND OF CONTRACTOR — STATUTES—TITLE AND SUBJECTS. Under Rem. & Bal. Code, § 1129, providing for liens for labor and supplies furnished in the construction of certain structures, including a railroad, with a proviso that the railroad company shall give a bond for the protection of laborers and materialmen, "which bond shall be filed . . . in the office of the county auditor" and that if the company fails to take such bond it shall be liable to persons furnishing labor and materials, the bond is made security for what the prior portion of the section made lienable and relieves the railway property from the lien; and no other construction would be constitutional, since the title of the act refers only to the enforcement of liens.

SAME — BOND OF CONTRACTOR — ACTIONS BY CREDITORS — NOTICE OF LIEN. An independent action on such bond as a statutory bond cannot be maintained except in the manner authorized by the statute for the enforcement of the lien, notice of which must be given by the filing of a lien notice as required by § 1134.

SAME—BOND BY CONTRACTOR—CREDITORS—COMMON LAW ACTION. There being no privity, creditors who failed to give notice of lien cannot maintain a common law action upon a bond given by a railroad company under Rem. & Bal. Code, § 1129, in lieu of the statutory lien for labor and supplies furnished in the construction of the road; the object of the bond under the statute being more to relieve the railroad property of the lien than for the protection of creditors of the company.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 5, 1915, in favor of the plaintiff, in an action on an indemnity bond, tried to the court. Reversed.

John W. Roberts and *George L. Spirk*, for appellant.

Sullivan & Christian, for respondent.

HOLCOMB, J.—Respondent brought this action against appellant to recover the purchase price of powder furnished by

[1]Reported in 155 Pac. 1050.

respondent to the Keasel Construction Company, which had a contract with the Puget Sound & Willapa Harbor Company for the construction of thirteen miles of railroad in Pacific county. The railway company took from the construction company a bond with the appellant as surety, conditioned that the construction company would faithfully perform the contract and pay all claims for labor, materials, supplies, etc. The bond was not filed for record in Pacific or any other county. The construction company having failed to pay for the powder and being unable to do so, the respondent, without having filed any notice of lien against any one, instituted this direct action against the appellant alone. Judgment was entered against the appellant for the amount prayed, this appeal resulting. The facts are not in dispute.

Respondent contends that it can recover on the bond as a statutory one, and if not, then upon it as a common law obligation. Whether either of these theories is correct is determinative of this case.

Section 1129, Rem. & Bal. Code (P. C. 309 § 53) reads as follows:

"Every person performing labor upon or furnishing material to be used in the construction, alteration or repair of any . . . railroad . . . has a lien upon the same for the labor performed or material furnished by each, respectively, whether performed or furnished at the instance of the owner of the property subject to the lien or his agent; and every contractor, subcontractor, architect, builder or person having charge, of the construction, alteration or repair of any property subject to the lien as aforesaid, shall be held to be the agent of the owner for the purposes of the establishment of the lien created by this chapter: Provided, that whenever any railroad company shall contract with any person for the construction of its road, or any part thereof, such railroad company shall take from the person with whom such contract is made a good and sufficient bond, conditioned that such person shall pay all laborers, mechanics, and materialmen, and persons who supply such contractors with provisions, all just dues to such persons or to any per-

son to whom any part of such work is given, incurred in carrying on such work, which bond shall be filed by such railroad company in the office of the county auditor in each county in which any part of such work is situated. And if any such railroad company shall fail to take such bond, such railroad company shall be liable to the persons herein mentioned to the full extent of all such debts so contracted by such contractor."

Appellant avers that this section is unconstitutional, in so far as it provides that a bond must be taken by the railroad company from its contractors to relieve itself from the liability of a lien against its property, because it was not included within the title of the act. In support of its contention, it cites *Armour & Co. v. Western Construction Co.*, 36 Wash. 529, 78 Pac. 1106. The first law upon this subject was passed in 1893, and in that act the words "labor and materials" were used in the title of the act, but not the word "provisions," which was used only in the proviso. The purchase price of provisions was sought to be recovered in the *Armour* case, and we there held that the word "provisions," used in the proviso, did not come within the reasonable scope of the meaning of the word "materials," used in the title; and in so far as the act attempted to give a cause of action against the bond for provisions, it was unconstitutional. In referring to the *Armour* case, *supra*, in *Laidlaw v. Portland, Vancouver etc. R. Co.*, 42 Wash. 292, 84 Pac. 855, the court remarked that, in the *Armour* case, it was held that that portion of the body of the act which purported to create a liability upon a railway company for failure to take a bond from a contractor conditioned to pay for provisions is not sufficiently comprehended in the title.

"What the court would have held if the controversy had been concerning the failure to take a bond to pay for 'labor,' since labor is named in the title, does not appear from the decision."

In 1905, the legislature amended the act only by putting the words "supplies and provisions" in the title of the act.

In *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. 869, 102 Pac. 766, we held that this did not cure the original defect declared in the *Armour* case, as the word "provisions" appeared only in the proviso and not in the declaratory portion of the act, and that the legislature cannot write an enacting clause and a proviso and call it a statute.

Many other cases referred to declare that the whole portion of the act which requires the railway company to take a bond from its contractor to avoid liability is unconstitutional, but only in so far as supplies and provisions are concerned as being a liability, since they appear only in the proviso and not in the declaratory portion of the act.

In the *Laidlaw* case, *supra*, the court practically held this bond feature of the act valid, since we said that the bond was to take the place of the lien; that is, if the bond was taken by the railway company, it relieved the property of the railway company from being lienable. But if the railway company neglected to take the bond, then a lien could be enforced against this property, and if this was not sufficient a personal judgment could be had for the balance. The court then said:

"Such a construction is urged by respondents, and we think it is entirely reasonable. It gives force to the whole section as pertaining to the enforcement of liens. We see no other way to construe it so as to give operative force to all provisions within the section and at the same time confine them to the subject of the enforcement of liens, which is the subject of the act."

Granting, for the sake of argument, but without deciding, as it is not necessary so to do in determining this case, the contention of respondent that it was not necessary to file the bond inasmuch as it was taken, and that powder is "material" within the meaning of Rem. & Bal. Code, § 1129 (P. C. 309 § 53), we think the contention of appellant that this action must fail, assuming the bond to be a statutory one, must be sustained. The *Laidlaw* case held that the bond

was made security for what the prior portion of the section said should be lienable against the railroad company. In other words, the materialmen in enforcing their claims must enforce them against the bond instead of the property of the railway company, and the taking of the bond relieves the property of the railway company from the burden of the liens and gives force to the whole section pertaining to the enforcement of liens. *A fortiori*, therefore, it follows that, by subjecting the bond to the payment of materialmen's claims, inasmuch as the asset sought to be exhausted and not the manner of exhausting or reaching the asset is substituted, the statutory regulations looking to the enforcement of a lien must be followed. In this case there was no pretense of filing a notice of lien as provided for in Rem. & Bal. Code, § 1134 (P. C. 309 § 63). Nor could the action in any way be construed as one seeking to foreclose a lien. Under the authority of the *Laidlaw* case, this could be the only construction that would not render the bond feature of the act unconstitutional, since the title of the act refers only to the enforcement of liens, and no cause of action could accrue by virtue of § 1129 unless it was in the enforcement of a lien. The proviso does not change the manner of procedure of enforcing the claim from a lien foreclosure to a straight action at law, but only changes the assets from which the claim is to be satisfied from the property of the railway company to the liability of the bond.

If this were not the correct construction of that act, it would work a hardship on surety companies never contemplated by the legislature, in that, if no notice were required, as contended by respondent, a claim could be prosecuted at any time within the statute of limitations against the surety company. Having no notice of the nature or amount of the claim, especially if an old one, the surety company could not make its investigation and prepare for any defense against such claim with any degree of efficiency, or settle or determine it without litigation. It would leave an unsettled and chaotic

condition of affairs until the statute of limitations had run. Having failed to comply with the statutory requirement of filing a notice of lien, and assuming the bond to be a statutory bond, the action must fail.

The other contention of appellant, that this action cannot be maintained, on the assumption that the bond is a common law one, for the reason that there is no privity of contract between respondent and appellant, it seems must also be sustained. In the *Armour* case, the action was against the railway company and its surety, the Aetna Insurance Company, where a bond was given under the provisions of § 1129, here under consideration, and the court there held that there could be no recovery as against the bonding company by a creditor of the contractor as a common law bond, since there was no privity between the creditor and the bonding company. Whether this court has in the meantime consistently followed this rule is immaterial, for it has expressly held it to be controlling in the recent case of *Rust v. United States Fidelity & Guaranty Co.*, 87 Wash. 93, 151 Pac. 248, where this court said:

"In *Armour & Co. v. Western Construction Co.*, 36 Wash. 529, 78 Pac. 1106, we held that a surety company on a private bond was not liable to a materialman as no privity existed between them; that is, the bond was not given for their benefit, and this is the general rule. But respondent argues that we held in effect in *State ex rel. Bartelt v. Liebes*, 19 Wash. 589, 54 Pac. 26; *Baum v. Whatcom County*, 19 Wash. 626, 54 Pac. 29; *McDonald v. Davey*, 22 Wash. 366, 60 Pac. 1116, and *Pacific Bridge Co. v. United States Fidelity & Guaranty Co.*, 33 Wash. 47, 73 Pac. 772, that contracts such as this are for the benefit of the creditors and that they may sue on such a bond for their own benefit. All of these cases except the *McDonald* case involved public bonds, which are presumptively given for the benefit of the creditors to take the place of a lien which does not lie against a municipality. While the court in the *McDonald* case apparently based the holding on the decisions on the same ground, there was sufficient in the

case to show that the bond was intended to protect the creditors. Whether that case is in harmony with the rule stated or not, we regard the *Armour* case as controlling."

See, also, *Spokane Merchants Ass'n v. Pacific Surety Co.*, 86 Wash. 489, 150 Pac. 1054.

It might be argued that this case falls within the rule announced in *State ex rel. Bartelt v. Liebes*, 19 Wash. 589, 54 Pac. 26, and *Baum v. Whatcom County*, 19 Wash. 626, 54 Pac. 29, inasmuch as this bond was given in lieu of the right to file a lien against the railway company, while in the cases just cited the bonds are public ones which are presumptively given for the benefit of the creditors to take the place of the lien which *does not lie* against a municipality. In the case of public bonds, however, the primary object is to protect the creditors, while the object of the bond in question is not so much to protect the creditors as it is to relieve the railway company from the burden of liens against its property, which incidentally might interfere with the public character of the railway company's property. This bond was a contract which was primarily to protect the railway company, while public bonds are primarily to protect creditors, as there can be no lien against a municipality in any event. There was no contractual relation between appellant and respondent concerning this bond, none arises by privity between the parties to the bond, and there being no privity of contract, assuming the bond to be a common law one, the action must fail.

The judgment is therefore reversed and the action dismissed.

MORRIS, C. J., MAIN, PARKER, and BAUSMAN, JJ., concur.

[No. 13046. Department Two. March 11, 1916.]

O. P. WESSELER, *Respondent*, v. GREAT NORTHERN RAILWAY COMPANY, *Appellant*.[1]

COMMERCE—INTERSTATE COMMERCE — EMPLOYMENT — FEDERAL EMPLOYERS' LIABILITY ACT. An express messenger is employed in interstate commerce, within the Employers' liability act, where he was serving the electric light plant in the express car to illuminate an interstate train, and was paid by both companies and under obligation to stay with the train through several states; and it is unnecessary to show that interstate shipments or passengers were being carried at the time.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $7,000 for personal injuries resulting in traumatic neurasthenia to an express mesenger, 39 years of age, earning $1,380 a year, will not be set aside as excessive, where he had shrunk twenty pounds, lost appetite and suffered from sleeplessness, headaches and chills, and might not recover for a period of from eight months to three years, and had lost $2,000 in earnings before the trial.

WITNESSES—PRIVILEGE—PHYSICIANS. Under Rem. & Bal. Code, § 1214, subd. 4, excluding the testimony of a physician, without the patient's consent, as to any information acquired in attending the patient which was necessary to enable him to prescribe, a physician cannot be asked as to the condition in which he found a patient for whom he intended to prescribe, whether he was up or how he was acting; it not being necessary for the patient to justify by showing that the same was the basis of the prescription; and it being immaterial that he had previously testified to taking from the physician medicine that put him to sleep.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 24, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a railway employee. Affirmed.

F. V. Brown and *F. G. Dorety*, for appellant.

Govnor Teats, *Leo Teats*, and *Ralph Teats*, for respondent.

BAUSMAN, J.—Wesseler was an express messenger, who, serving defendant's interstate train between Washington and

[1]Reported in 155 Pac. 1063; 157 Pac. 461.

Montana, received pay from the express company with a supplement from the railway company for services at the train's electric plant in the express car. That he was hurt by the fault of the railway company is not denied. The sole questions are whether he has trial rights under the Federal liability act, whether the jury was properly instructed, and whether the jury gave him too much.

As to the first, there is no evidence that the train had, at the time of the injury, interstate freight or passengers, that the express company then had interstate shipments, or that the train was carrying interstate passengers whom Wesseler could be serving by turning on, as he said he was then doing, the electric current to illuminate the train. On the other hand, there is no testimony that there was not interstate freight, express shipments, or passengers. It is accordingly argued that Wesseler, though he might at the next station have come into interstate service, was not in it just then.

The proper presumption need not be chosen. While there is no precise precedent, it is present apparent authority that Wesseler was part of the equipment of the interstate vehicle. This express car with its electric equipment had to go forward in charge of some one to receive if not to discharge interstate shipments, as well as to maintain the electric plant, and Wesseler's obligation was to remain with it to Montana. He was as much in interstate commerce with it empty as full. *Horton v. Oregon-Washington R. & Nav. Co.*, 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8; *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, Ann. Cas. 1914 C. 153; *North Carolina Co. v. Zachary*, 232 U. S. 248, Ann. Cas. 1914 C. 159. There is nothing contrary to this in *Boyle v. Pennsylvania Co.*, 228 Fed. 266, where the train was not an interstate but a distinctly within state train, and only made connections with an interstate train.

As to the instructions, it is not necessary for us to discuss them at length. We are satisfied the law was properly ex-

pounded to the jury, and that neither technical nor substantial advice was either given or refused to the prejudice of the defendant.

The real question is the amount of damages. Wesseler was thirty-nine years of age, and nothing of substantial prejudice in his previous life is adduced. That he was not shamming is frankly conceded in argument by defendant's counsel, who, however, contends that the verdict of $7,000 for his traumatic neurasthenia is excessive. The principal facts are that Wesseler had been seventeen months away from work before the trial, that he had shrunk approximately twenty pounds, that he had lost what was once a vigorous appetite, and that he was suffering from sleeplessness, headaches, and occasional chills. The opinion of doctors, summed up, was that he would indeed recover, but only in a period running from eight months to three years. He had been earning, at the time of his accident, $1,380 a year. As to his earnings between the injury and the trial and afterwards, something small had been and might be earned, but not sums large or from methodical application.

It is a delicate business to interfere with degree where the right of another body to settle an amount is conceded. Now something substantial must be allowed this man, to begin with, for the shock and fright of coming to consciousness in a ditch where he found himself groping and groveling in the sand. With the shock of the moment must be considered inevitable, and here established, nervousness immediately following it. If we add to that approximately $2,000 lost before the trial, we are unable to say that this verdict is too large. What we should have awarded him ourselves is unimportant. The jury's award must be sustained unless clearly erroneous. That we cannot adjudge it to be. Their estimates of his losses and their deductions for his earnings are equally undisclosed and in their province.

Judgment affirmed.

MORRIS, C. J., MAIN, PARKER, and HOLCOMB, JJ., concur.

ON PETITION FOR REHEARING.

[Decided May 9, 1916.]

PER CURIAM.—Appellant invokes a ruling on the lower court's excluding questions to its witness, plaintiff's physician, after what we deem objections by plaintiff both seasonable and proper.

Our statute says that a physician shall not testify without the patient's consent, or be examined "as to any information *acquired* in attending such patient, which was necessary to enable him to prescribe or act for the patient." Rem. & Bal. Code, § 1214, subd. 4.

This physician, on his visit, expected to prescribe, but defendant asked him whether plaintiff was up and dressed, whether he was moving about, whether he was staggering, walking in a hesitating manner, reeling, or showing any signs of nausea or dizziness. Defendant would justify these because, *first*, he was not asked to quote the patient; *second*, that while these symptoms might be observed for prescribing, it would be for the plaintiff to show that they were the basis of that; and *third*, that plaintiff had previously related that he took from this doctor a draught of medicine which put him asleep.

As to the first, it is not simply information gained from the patient's mouth that the statute excludes, but information "acquired in attending," not merely told or overheard. As to the second, the burden of justification plainly should be on the defense. As to the third, all that plaintiff had said was that he had taken the draught from him and had fallen asleep after a headache. This was no attempt to describe the doctor's treatment or theory of the disease or to quote a doctor while shutting his mouth. We passed these arguments because we deemed them quite without merit.

The petition is denied.

[No. 13234. Department Two. March 11. 1916.]

H. P. KENNEDY, *Respondent*, v. MEILICKE CALCULATOR COMPANY, *Appellant*.[1]

APPEAL—NOTICE—TIME OF TAKING. A separate cross-appeal may be taken within the same time, 90 days, as is given for taking the first appeal, by Rem. & Bal. Code, §§ 1718, 1719, 1721.

DAMAGES—BREACH OF CONTRACT—DUTY TO MITIGATE. In an agent's action for damages for breach of contract for an exclusive selling agency, loss of services for eight months on account of the defective nature of the machines is properly reduced one-half, where plaintiff was as well aware of the extent of the breach at the end of three or four months as at the end of eight months.

PRINCIPAL AND AGENT—SALES ON COMMISSION—BREACH OF CONTRACT. The defective nature of machines to be sold under an exclusive selling agency contract is a breach of the contract entitling the agent to damages.

APPEAL—REVIEW—FINDINGS. Findings on conflicting evidence will not be disturbed where supported by disinterested evidence as against opposing interested testimony.

SAME—SALES ON COMMISSION—BREACH OF CONTRACT—MEASURE OF DAMAGES. On breach of contract for an exclusive selling agency, by reason of the defective nature of the machines, the agent is entitled to recover traveling expenses paid out in attempting to sell the defective machines; but not the expenses of a voluntary trip taken for the purpose of securing the contract.

Cross-appeals from a judgment of the superior court for King county, Dykeman, J., entered April 15, 1915, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Modified on defendant's appeal.

Tucker & Hyland, for appellant.

Trefethen, Grinstead & Laube, for respondent.

HOLCOMB, J.—Plaintiff took a cross-appeal herein from the final judgment within ninety days after the entry thereof, being the same final judgment from which defendant appealed. There is a motion by appellant to dismiss the cross-

[1]Reported in 155 Pac. 1043.

appeal of plaintiff as not taken in time or within fifteen days after final judgment. There is no merit in the motion and it is denied. Plaintiff, taking a separate cross-appeal, has the same time given him by law as has any appellant. Rem. & Bal. Code, §§ 1718, 1719, 1721 (P. C. 81 §§ 1187, 1189, 1193).

The principal questions involved on appeal are of fact, and were resolved by the trial court on the evidence chiefly in favor of plaintiff. The plaintiff sued for damages aggregating $2,663.44, for the alleged breach of a contract. The contract sued on was one establishing an exclusive agency in Washington and Alaska for the sale of a patented machine called Meilicke Calculator, an interest and discount computer. The breaches alleged were, (1) that the calculators furnished by defendant were all defective, both as to materials and in mathematical computation; and (2) that other persons were permitted to bring similar calculators into plaintiff's territory and offer the same for sale. The items of damage alleged by plaintiff were as follows:

For cash paid appellant for calculators	$828.50
For traveling expenses	192.05
For office expenses	321.80
Cash for expressage	111.74
Advertising	9.35
Services of respondent for 8 months at $150 per month	1,200.00

The court found for the plaintiff on every item as pleaded, both as to the breaches by the defendant and as to damages sustained by plaintiff, and credited defendant with certain sums for calculators sold and concerning which there is no dispute, a total of $1,027.88. His conclusion of law, however, did not apparently follow his findings, for instead of allowing plaintiff the sum of $1,635.56, he concluded that plaintiff was entitled only to the sum of $1,035.56, or $600 less than the total amount claimed by plaintiff. It is from this that plaintiff appeals.

Plaintiff contends that, where a jury is waived in an action at law and the case is tried by the court, the findings of the court are equivalent to a verdict and will not be interfered with when there is evidence upon which to base the findings (*Second Nat. Bank of Colfax v. Hatch*, 24 Wash. 421, 64 Pac. 727; *Graham v. Bell-Irving*, 46 Wash. 607, 91 Pac. 8; *Judson v. Tide Water Lumber Co.*, 51 Wash. 164, 98 Pac. 377), and that the findings control the conclusion (*Gerhard v. Worrell*, 20 Wash. 492, 55 Pac. 625).

We have not the benefit of the trial court's reasons for concluding that the plaintiff was not entitled to all the sums which he apparently found in favor of plaintiff. We assume, however, that, since the plaintiff had been engaged in selling what he contended to be a very defective and unsalable article for eight months, he should not be permitted to allow the damages to accumulate to such an extent, but should have been able to determine his rights in a much less time, or not to exceed one-half the time for which he claimed, and with this view we are inclined to concur with the lower court and to hold that his conclusion was justified, but not his finding. A careful consideration of the facts convinces us that no greater sum is allowable, and his finding of fact is corrected to that sum. This was not a contract for hire under which plaintiff was engaged, but was a selling agency to sell a certain thing in exclusive territory. Plaintiff was as well aware of the extent of defendant's failure to comply with its contract at the end of three or four months as he was at the end of eight months, and we think the trial court was sufficiently liberal in his allowance.

As to all the questions raised by defendant, there is evidence sufficient to justify the finding of the court that the calculators furnished appellant were all defective, both as to materials and in mathematical computation. This failure on the part of defendant alone would be sufficient to justify a rescission of the contract. The evidence on behalf of defendant was all by the principal officers and employees of

the company and of the nature of interested testimony; while that on behalf of plaintiff was, to some extent at least, of disinterested testimony. Under such circumstances, we do not feel at liberty to disturb the findings of the trial court.

If the contract was breached by defendant, plaintiff was entitled to recover all moneys he had necessarily paid out under and in faith of the contract. There is very little, if any, conflict in the testimony as to the amounts paid out by plaintiff in attempting to sell the calculators, but there is one item included in the item of traveling expenses which should not have been allowed. Plaintiff testified that $76 of that item was for his expenses from Seattle to Chicago and return, which trip he made without any direct inducement from the defendant for the purpose of securing the contract. This item of expense was obviously not made under and in faith of the contract, but was entirely voluntary. The rest of the item of traveling expenses was testified to be for traveling in the state of Washington attempting to sell the defective machines.

The judgment will be modified to eliminate $76 therefrom, and as so modified will be affirmed. Appellant, having obtained a substantial reduction of the judgment in this court, will be entitled to its costs on appeal.

PARKER, BAUSMAN, and MAIN, JJ., concur.

[No. 13257. Department Two. March 11, 1916.]

J. T. GUERIN, *Appellant*, v. CLARKE COUNTY, *Respondent*.

PAUPERS—CARE AND SUPPORT—MEDICAL ATTENDANCE—LIABILITY OF COUNTY. A county is not liable to a physician for treating persons who are not accepted paupers, without any order from any one in authority, as plainly required by Rem. & Bal. Code, § 8377.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered May 29, 1915, upon granting a nonsuit, dismissing an action on an implied contract for services rendered. Affirmed.

Miller & Wilkinson, for appellant.

Jas. O. Blair and *McMaster, Hall & Drowley*, for respondent.

BAUSMAN, J.—The plaintiff physician sues a county for professional services rendered in the county to one resident and eight nonresidents indigent, but judgment was properly rendered against him, for he neither had a claim to begin with nor had properly presented one.

These persons were not accepted paupers, and no county officer had requested plaintiff to treat them. Nothing can be plainer, under Rem. & Bal. Code, § 8377 *et seq.* (P. C. 115 § 311), than that, however much the poor may of a sudden require a physician, a bill for such work cannot be run up against the county without an order from some one in authority. Even were we to suppose the county under a common law obligation, this thing has long been regulated by statute. Neither that statute nor reason exposes our counties to what might otherwise become enormous charges, unnecessary services, and feigned situations. These are old statutes and this their old interpretation. *King County v. Collins*, 1 Wash. Terr. 469.

Judgment affirmed.

MORRIS, C. J., MAIN, HOLCOMB, and PARKER, JJ., concur.

[1]Reported in 155 Pac. 1035.

[No. 13277. *En Banc.* March 11, 1916.]

F. R. SINGLETON, *Respondent*, v. M. L. HAMILTON *et al.*, *Appellants*, STIMSON COMPANY, *Intervener*.[1]

PAUPERS—CARE AND MAINTENANCE — POWERS OF COMMISSIONERS—POOR FARMS. The county commissioners are, by necessary implication, authorized to purchase a county poor farm for paupers, by Rem. & Bal. Code, § 8374, vesting the commissioners with entire and exclusive superintendence of the poor; Id., § 8377, providing that they may enter into contracts for the maintenance or appoint agents to oversee and provide for paupers; and Id., § 8384, authorizing them to provide workhouses for their accommodation and employment.

SAME. Such power is conferred by necessary implication by Id., § 3822, authorizing a county to purchase such lands as may be necessary to its corporate or administrative powers, and Id., § 3824, providing that the powers of the county can be exercised only by the county commissioners; the power to care for paupers being a corporate and administrative power.

Appeal from a judgment of the superior court for King county, Ronald, J., entered November 12, 1915, in favor of the plaintiff, in an action for injunctive relief, tried to the court. Reversed.

Alfred H. Lundin, Edwin C. Ewing, and *Kerr & McCord*, for appellants and intervener.

Wettrick, Anderson & Wettrick, for respondent.

MOUNT, J.—The only question involved in this case is whether the county commissioners of King county are authorized to purchase and conduct a county poor farm for paupers within that county. The trial court was of the opinion that the statute, neither by express terms nor by necessary implication, authorized the purchase of such a farm, and entered judgment accordingly. This appeal is prosecuted from that judgment.

[1]Reported in 155 Pac. 1057.

The statute in relation to paupers provides as follows, at Rem. & Bal. Code, § 8374 (P. C. 115 § 305):

"The board of county commissioners of the several counties of this state are hereby vested with entire and exclusive superintendence of the poor in their respective counties: Provided, that this section shall not be so construed as to include any incorporated city or town having by its charter any of the powers enumerated in said section."

Section 8377 (P. C. 115 § 311) provides:

"When any poor person shall not have relatives in any county in this state, as are named in the preceding sections, or such relatives shall not be of sufficient ability, or shall fail or refuse to maintain such a pauper, then the said pauper shall receive such relief as the case may require, out of the county treasury; and the county commissioners may either make a contract for the necessary maintenance of the poor, or appoint such agents as they may deem necessary to oversee and provide for the same."

Section 8384 (P. C. 115 § 325) provides:

"The board of county commissioners of any county in this state may, if they think proper, cause to be built or provided in their respective counties workhouses for the accommodation and employment of such paupers as may from time to time become a county charge; and said workhouses and paupers shall be under such rules and regulations as said board of commissioners may deem proper and just. . . ."

It is apparent from these provisions that the board of county commissioners of the several counties in this state are vested with the entire and exclusive superintendence of the poor within their respective counties; second, that the county commissioners may enter into contracts for the maintenance of the poor, and provide for the same out of the county treasury, or may appoint agents to oversee and provide for such paupers; and third, the county commissioners may build or provide workhouses for the accommodation and employment of such paupers in their respective counties. We think it is apparent from these provisions of the statute

that the county commissioners of the different counties in this state are vested with the entire charge of paupers within their counties. It is true there is no express provision for the purchase of farms or lands for the purpose of caring for such paupers. But we are satisfied that a superintendence of such paupers necessarily implies that the county commissioners may purchase lands for that purpose. Otherwise there would be little use to appoint agents to oversee and provide for such paupers; and county commissioners could not cause to be built or provided in their respective counties workhouses for the accommodation and employment of such paupers. We think it follows as a matter of course, by necessary implication, that, when the county commissioners are made by statute the supervisors of the poor in their county, and authorized to appoint agents to oversee and provide for the same, and are authorized to provide for and cause to be built workhouses within the county for the support and accommodation of the poor, the necessary means to carry out these ends could be provided.

Furthermore, we are satisfied that, even though the power to purchase land is not necessarily implied in these provisions, the statute which defines the general powers and duties of county commissioners is broad enough. Relating to the powers of bodies corporate, the statute provides:

"The several counties in this state shall have capacity as bodies corporate . . . to purchase and hold lands within its own limits; to make such contracts, and to purchase and hold such personal property, as may be necessary to its corporate or administrative powers, and to do all other necessary acts in relation to all the property of the county." Rem. & Bal. Code, § 3822 (P. C. 107 § 1).

Section 3824 (P. C. 107 § 5) provides that the powers of the county can be exercised only by the county commissioners, or by agents or officers acting under their authority.

We have seen above that the county commissioners of the different counties in this state are vested by statute with en-

tire and exclusive superintendence of the poor in their respective counties. It follows that the power to care for paupers within their respective counties is a corporate and administrative power. This being so, it is plain that, under the provisions of § 3822, the commissioners have power to purchase lands necessary to the exercise of such power. And this, we take it, is an express authorization to county commissioners to purchase necessary lands for the use of paupers. The extent of such lands, and the facilities for operating the same, must necessarily rest within the discretion of the commissioners, limited only by the indebtedness which the county commissioners may create for county purposes.

The case of *Cochrane v. King County*, 12 Wash. 518, 41 Pac. 922, involved the right of county commissioners to construct a building for the county to be used for the maintenance of its paupers. The question decided in that case was that county commissioners might authorize the expenditure of money for that purpose when funds were not already available in the treasury. It was apparently conceded in that case that the county was authorized to construct such buildings. The question was necessarily conceded, or otherwise the judgment could not have resulted as it did in that case. And it has been the policy of the different county commissioners in this state to purchase, own, and operate farms for the care of paupers within their respective counties. In other words, it has been the uniform custom in the state to construe these sections as authorizing county commissioners to purchase poor farms.

It is apparently conceded that county commissioners would have authority to build or provide workhouses. But it is contended, as we understand the argument of the respondent, that the term "workhouses" here means jails, or places where prisoners are confined. That may have been the ordinary original meaning of the term workhouse. But that term is also defined by Bouvier as "A house where the poor are taken care of and kept in employment." Bouvier, Law Dictionary

(Rawle's 3d Rev.), p. 3487. And clearly this was the meaning that the legislature intended the word "workhouse" should have in Rem. & Bal. Code, § 8384 (P. C. 115 § 325), because it is there stated that county commissioners may cause to be built or provided in their respective counties, workhouses for the accomodation and employment of such paupers as may from time to time become county charges. The statute itself defines workhouses as being for the "Accomodation and employment of such paupers as may from time to time become a county charge."

For these reasons, we are satisfied that a proper construction of these statutes authorized the county commissioners to purchase a farm for the accomodation, employment, and care of paupers within their respective counties. The trial court therefore erred in holding that the county commissioners of King county had no authority to make the purchase in this case.

The judgment is reversed, and the cause remanded with directions to dismiss the action.

MORRIS, C. J., HOLCOMB, BAUSMAN, MAIN, ELLIS, and PARKER, JJ., concur.

[No. 12399. Department One. March 15, 1916.]

F. A. HAZELTINE, *Respondent*, v. ELI ROCKEY *et al.*, *Appellants*.[1]

JUDGMENT—DEFAULT—VACATION—DISCRETION. The denial of a motion to vacate a judgment of default is not an abuse of discretion, where the action was commenced November 19, 1912, judgment was entered April 26, 1913, motion to vacate was not made until December 15, 1913, and the allegation that default was entered without notice while negotiations for settlement were pending was denied by counter affidavits.

Appeal from an order of the superior court for Pacific county, Edward H. Wright, J., entered April 26, 1913, denying a motion to vacate a judgment. Affirmed.

Lockerby & Couden, for appellants.

Fred M. Bond, for respondent.

CHADWICK, J.—Plaintiff brought this action against defendants to recover for piling cut on lands belonging to plaintiff. After negotiating and corresponding for some time, an order of default was entered and a judgment rendered thereon. The action was begun on November 19, 1912. Default was entered and judgment rendered on April 26, 1913.

On December 15, 1913, defendants moved to set aside the judgment. The motion is supported by the affidavit of defendant Eli Rockey. He alleges that negotiations were pending for a settlement of the differences between the parties, and that for this reason he did not employ an attorney; that he had no notice of the default or judgment until after December 4, 1913, when a writ of garnishment was issued upon the judgment; that he thereupon immediately moved to set aside the default and to vacate the judgment. The merits of his defense are set forth in the affidavit.

Counter affidavits, denying the material allegations of the affidavit and setting up affirmatively that defendant had

[1]Reported in 155 Pac. 1056.

notice of the intention of plaintiff to claim a default and judgment at the time it was claimed and entered, and that he had subsequent notice of the judgment and of plaintiff's intention to coerce the payment thereof, were filed. The affidavits being in sore conflict, coupled with the lapse of time between the entry of the judgment and the filing of the motion to vacate, impels the holding that the trial judge did not abuse his discretion. *Livesley v. O'Brien*, 6 Wash. 553, 34 Pac. 134; *McCord v. McCord*, 24 Wash. 529, 64 Pac. 748; *Moody v. Reichow*, 38 Wash. 303, 80 Pac. 461; *Hays v. Peavey*, 54 Wash. 78, 102 Pac. 889.

Affirmed.

MORRIS, C. J., MOUNT, ELLIS, and FULLERTON, JJ., concur.

[No. 12811. Department Two. March 15, 1916.]

THE STATE OF WASHINGTON, *on the Relation of D. W. Yeargin, Appellant*, v. A. MASCHKE *et al., Respondents*.[1]

APPEAL — DECISIONS APPEALABLE — INFERIOR TRIBUNAL — COUNTY COMMISSIONERS — ORDER FIXING SALARY — DISCRETION. Rem. & Bal. Code, § 3909, which provides for appeals from a decision or order of the board of county commissioners to the superior court, is limited to cases requiring the exercise of purely judicial power; and hence has no application to, and no appeal lies from, an order fixing the salary of a court commissioner, under Id., §§ 83, 85, and 87, authorizing the appointment by the superior court of court commissioners, defining their power as that of a judge, and conferring on the county commissioners the right to fix the salary.

MANDAMUS—ADEQUACY OF REMEDY BY APPEAL. An order of the county commissioners fixing the salary of a court commissioner, involves the exercise of discretion which is unassailable unless arbitrary or capricious, which fact cannot be determined by review of the record; hence the remedy by appeal is inadequate and mandamus lies.

MANDAMUS — ADEQUACY OF REMEDY BY CERTIORARI — DISCRETION — REVIEW—TRIAL DE NOVO. There is no right to trial *de novo* upon a

[1]Reported in 155 Pac. 1064.

review by writ of certiorari, and the remedy is inadequate to review an order of the county commissioners fixing the salary of a court commissioner, involving discretion; since, whether the order was arbitrary or capricious, can be determined only by trial *de novo*, and not by review of the record.

SAME—WHEN LIES—TO BOARDS—COUNTY COMMISSIONERS — DISCRETION—ARBITRARY ACTION. Where the board of county commissioners acts arbitrarily or refuses to exercise its discretion in fixing the salary of a court commissioner, mandamus will lie to require it to exercise its discretion.

SAME — TO BOARDS — COUNTY COMMISSIONERS — FIXING SALARY—FAILURE TO EXERCISE DISCRETION—ABUSE — EVIDENCE — SUFFICIENCY. The action of the board of county commissioners in reducing the salary of a court commissioner from $15 to $1 a month, will be set aside as arbitrary and without the exercise of a proper discretion, where it appears that two members of the board were actuated by a personal or political enmity, had no knowledge of the scope of the powers or nature or extent of the duties of the office, and made no investigation of the records or inquiry of the judge making the appointment as to the amount of work, which had increased during the preceding years, and there was no presiding judge residing in the county.

Appeal from a judgment of the superior court for Ferry county, G. V. Alexander, Esq., judge *pro tempore*, entered February 27, 1915, dismissing mandamus proceedings, after a trial to the court on the merits. Reversed.

Porter & Porter, for appellant.

Charles P. Bennett, for respondents.

MAIN, J.—The purpose of this action was to secure a writ of mandamus directed to the board of county commissioners of Ferry county for the purpose of compelling such board to vacate and rescind an order entered by it on April 12, 1913, by which it fixed the salary of the court commissioner of that county at $1 per month. On September 6, 1910, the relator was appointed court commissioner for Ferry county, and served as such continuously up to the time of the trial of this action. On January 6, 1910, the commissioners had fixed the salary of the court commissioner at $15 per month.

It remained at this sum until the order of April 12, 1913, was entered. Subsequent to the time when the salary was reduced to $1 per month, the relator refused to accept the salary, and demanded a salary of $15 per month, claiming that the board in reducing the salary acted arbitrarily and capriciously, and was actuated by improper motives.

After the issues in the case were framed, the cause was tried to the court without a jury, and resulted in a judgment dismissing the action. From this judgment, the appeal is prosecuted.

The record presents three questions: First, Did the relator have a remedy by appeal from the action of the board of county commissioners to the superior court? Second, Did the relator have a remedy by certiorari to review the action of the board of county commissioners? And third, If there was no adequate remedy by appeal or certiorari, will mandamus lie to compel the rescission of an order which was arbitrarily entered?

I. The right to appoint a court commissioner is derived from art. 4, § 23, of the constitution. This section provides that such commissioner shall perform like duties as a judge of the superior court at chambers, and perform such other duties connected with the administration of justice as may be prescribed by law. Section 83, Rem. & Bal. Code (P. C. 131 § 1) provides that the judge of the superior court having jurisdiction in the particular county may appoint a court commissioner for that county. By § 85 (P. C. 131 § 3) the power, authority, and jurisdiction of court commissioners are defined. By § 87 (P. C. 131 § 7) it is provided that every court commissioner shall be allowed a salary in addition to the fees provided for, in such sum as the board of county commissioners may designate. In this statute, which provides for the appointment, defines the authority and jurisdiction, and confers upon the board of county commissioners the right to fix the salary of the court commissioner, there is no provision for an appeal from the order of the board fixing the

salary. If the right of appeal exists, it is by virtue of Rem. & Bal. Code, § 3909 (P. C. 115 § 223), which is a general statute providing for appeals from a decision or order of the board of county commissioners to the superior court of the proper county.

In *Selde v. Lincoln County*, 25 Wash. 198, 65 Pac. 192, construing this statute giving the right of appeal, it was held that appeals from the board of county commissioners to the superior court "must be limited to such cases as require the exercise of purely judicial power, and, therefore, when the board of county commissioners exercises political power, or legislative power, or administrative power, or discretionary power, or purely ministerial power, no appeal involving a trial *de novo* will lie." It is obvious that the statute giving the board of county commissioners power to fix the salary of the court commissioner confers upon such board discretionary power. If the action of the board of county commissioners was arbitrary or capricious, this fact can only be determined by a trial *de novo* in the superior court. In no other way could the facts which show such arbitrary or capricious conduct, if in fact it existed, be made to appear. These facts were what produced the action of the board, and would not be shown by the record of the proceedings of such board. There being no right to a trial *de novo*, under the holding in the *Selde* case, there was no appeal from the action of the board which would afford an adequate remedy.

II. A writ of certiorari may be issued in cases where there is no plain, speedy, and adequate remedy in the ordinary course of law. Rem. & Bal. Code, § 1002 (P. C. 81 § 1729). Had, then, the relator a remedy by certiorari? In that proceeding there can be no trial *de novo* in the reviewing court unless such a trial is authorized by statute. 6 Cyc. 833; Bailey, Habeas Corpus, p. 737; Harris, Certiorari, p. 65; *Los Angeles v. Young*, 118 Cal. 295, 50 Pac. 534, 62 Am. St. 234; *Commissioners of Mason & Tazewell Special Drainage Dist. v. Griffin*, 134 Ill. 330, 25 N. E. 995;

State ex rel. Spokane & Inland Empire R. Co. v. State Board of Equalization, 75 Wash. 90, 134 Pac. 695.

No statute in this state has been called to our attention which gives the right to a trial *de novo* when there is a review by certiorari. As already stated, anything short of a trial *de novo* in the superior court would be unavailing to the relator, because he could not otherwise show that the action of the county commissioners was arbitrary or capricious. The writ of certiorari, if issued, would bring before the superior court for review simply the record made by the county commissioners, and the facts or motives which actuated the commissioners would not be shown by the record, and could not be shown in the superior court without a trial *de novo*. Certiorari would not be an adequate remedy.

III. If the relator had no adequate remedy by appeal, or by a writ of certiorari, the question then arises whether mandamus will lie to compel a rescission of the order of April 12, 1913, if in entering that order the commissioners did not exercise an honest discretion, but acted arbitrarily. The general rule, of course, is that the discretionary power of the board of county commissioners is not subject to review by the court. But this is not a universal rule. If the action of the board of county commissioners is arbitrary or capricious, or if its action is prompted by wrong motives, there is not only an abuse of discretion, but, in contemplation of law, there has been no exercise of the discretionary power. If an honest discretion, as demanded by the law, has not been exercised, the result is to substitute arbitrary action for such discretion. If a tribunal such as the board of county commissioners acts arbitrarily, or refuses to exercise its discretion, the law will by mandamus require it to exercise its discretionary power. 26 Cyc. 161; *State ex rel. Brown v. Board of Dental Examiners*, 38 Wash. 325, 80 Pac. 544; *State ex rel. Kelleher v. Board of President & Directors of St. Louis Public Schools*, 134 Mo. 296, 35 S. W. 617, 56 Am. St. 503; *Illinois State Board of Dental Examiners v.*

People ex rel. Cooper, 123 Ill. 227, 13 N. E. 201; *Wood v. Strother*, 76 Cal. 545, 18 Pac. 766, 9 Am. St. 249.

In the case first cited, after stating the general rule that the discretionary power of such tribunal is not subject to review by the court, it is said:

"But, notwithstanding this, it is equally well established that courts will compel by mandamus the honest performance of official duty, and if, under pretense of exercising discretion, the power is exercised with manifest injustice or is grossly abused, or duty is avoided, the courts will grant relief. The action of the court must, in reality, be based upon the assumption that the inferior tribunal has refused to exercise the discretion with which it is clothed; because, if it acts arbitrarily or fraudulently, or through unworthy or selfish motives, or conspires against the rights of individuals, under the law, and therefore against the law itself, it has not strictly, as is frequently said, 'abused its discretion'—a term which is responsible for some confusion of ideas on this subject—but in contemplation of law, it has not exercised its discretion at all, but has sought to substitute arbitrary and fraudulent disposition and determination of the question submitted, for the honest discretion demanded by the law. In such cases the law will, by mandamus, compel the tribunal to act honestly and fairly, or, in other words, to *exercise its discretion;* and, when this distinction is kept in mind, the seeming difficulties which have surrounded this question, and which have caused so much discussion, disappear."

If the court has the power to compel the board to exercise its discretion, it would seem reasonably to follow that it has the power to vacate and annul the order of such board which is not the result of the exercise of an honest discretion, but is an arbitrary and capricious action.

It remains to inquire whether the board in fixing the salary of the court commissioner at $1 per month exercised an honest discretion, or acted arbitrarily or from improper motives, and thus failed to exercise that discretion which the law demands. The action of the board in reducing the salary was supported by two of the commissioners, and opposed by one. The two commissioners who favored the re-

duction of the salary had been elected to the board at the previous November election. Their election was opposed by the relator in this case, who supported the rival candidates. A careful reading of the record leads to the conclusion that the action of the majority of the board of county commissioners was prompted by a desire to oust the relator from the office of court commissioner because of either personal or political enmity which they entertained towards him.

The two commissioners who favored a reduction of the salary, testifying in their own behalf, stated that they had inquired around and made investigation prior to the time they took action reducing the salary; but neither of them made any investigation of the records in the office of the clerk of the superior court for the purpose of determining the amount of work which the court commissioner had done. One of these county commissioners testified that, in his investigation, he found that all the court commissioner had to do was to sign "his name to papers which were prepared by attorneys; that is the principal part of it; that is what I found out." No inquiry appears to have been made of the judge of the superior court whose appointee the court commissioner was.

One of the commissioners, prior to the time this action was instituted, stated to one of the attorneys for the relator that if he brought suit he might as well quit Republic, as he would thereafter get no business along his lines in that town.

In January preceding the time when the action was taken reducing the court commissioner's salary, the county had been advanced from the twenty-second class to a county of the twentieth class. During the few years next preceding the action of the board which is involved in this controversy, the work of the court commissioner had materially increased. There was no judge of the superior court who resided in that county.

The members of the board of county commissioners who favored the reduction of salary apparently had no knowledge

of the scope of the power exercised by the court commissioner, nor the nature or extent of his duties. They had no knowledge of the amount of work that he actually did. They did not know that the work of the office had increased during the few years preceding. They seem to have been actuated by one motive, and that was to so reduce the salary as to force the resignation of the relator from that office. This was a gross abuse of discretion; or, as stated in the authorities, was the failure to exercise that discretionary power which the law imposed upon the board of county commissioners. If the board of county commissioners, by reduction of the salary of court commissioner, can force the vacation of that office, which, under the statute, the judge of the superior court has the right to fill, it in a measure takes from the judge of the superior court the power of appointment and vests it in the board of county commissioners.

The conclusion reached in this case is in no way in conflict with the case of *Dillon v. Whatcom County*, 12 Wash. 391, 41 Pac. 174. In that case, the question of arbitrary conduct or abuse of discretion on the part of the board of county commissioners was not involved.

The judgment will be reversed, and the cause remanded with direction to the superior court to enter a judgment directing that a writ of mandamus issue to the board of county commissioners commanding them to vacate and rescind the order entered on April 12, 1913, by which the salary of the court commissioner of Ferry county was reduced to $1 per month.

MORRIS, C. J., PARKER, HOLCOMB, and BAUSMAN, JJ., concur.

[No. 12933. Department One. March 15, 1916.]

HAZEL MOYSES, *Respondent*, v. PETER NYBOE *et al.*, *Appellants*.[1]

HOMESTEAD — SELECTION — RIGHT TO DECLARE — COMMUNITY PROPERTY — CONVEYANCES. A husband may, after the death of his wife, declare a homestead in community property and sell and convey it by his own deed in full fee simple title.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 3, 1915, in favor of the plaintiff, in an action to quiet title, tried to the court. Reversed.

E. L. Sanders, *F. C. Hackman*, and *Ballinger & Hutson*, for appellants.

Higgins & Hughes and *Wm. C. Froude*, for respondent.

CHADWICK, J.—This action was brought to quiet title to lots three and four, block eighteen, Squire's addition to Seattle. The lots in question were originally acquired as community property by Isaac A. Moyses and Ella Moyses. Ella Moyses died intestate October 13, 1907, leaving, as her heirs, her husband, Isaac A. Moyses, and Hazel Moyses, a minor child. A declaration of homestead was filed by the husband, and a decree setting aside the property as a homestead was granted April 3, 1908. The property was deeded by Isaac A. Moyses to Emma E. VanHook, who, in turn, deeded it to appellants. The respondent claims a one-half interest in the property as heir of Ella Moyses.

The case presents but one question: May a husband declare a homestead in community property after the death of his wife, and hold it in his own right, or, as in this case, sell the property and convey, by his own deed, the full fee simple title thereto. The question has been answered in the affirma-

[1]Reported in 155 Pac. 1036.

tive by this court. *Stewin v. Thrift*, 30 Wash. 36, 70 Pac. 116; *In re Feas's Estate*, 30 Wash. 51, 70 Pac. 270. The subject was reviewed in detail in *Stewart v. Fitzsimmons*, 86 Wash. 55, 149 Pac. 659.

The judgment is reversed, and the cause remanded with instructions to dismiss.

MORRIS, C. J., MOUNT, ELLIS, and FULLERTON, JJ., concur.

[No. 12959. Department Two. March 15, 1916.]

WILLIAM A. BEELER, *Administrator etc.*, *Appellant*, v. R. H. BARR, *Respondent*.[1]

APPEAL — PRESERVATION OF GROUNDS — EXCEPTIONS TO FINDINGS. Where no exceptions were taken to the findings and there is no contention that the conclusion of law and judgment do not necessarily follow the findings, the statement of facts will be stricken and the judgment affirmed.

Appeal from a judgment of the superior court for Cowlitz county, Darch, J., entered April 27, 1915, upon findings in favor of the defendant, in an action upon a promissory note, tried to the court. Affirmed.

Coy Burnett and *Schwartz & Saunders*, for appellant.

Ralph R. Duniway, for respondent.

HOLCOMB, J.—Appellant, as administrator of the estate of Acteson, sued upon a promissory note to recover $400 and interest, attorney's fees, and costs. The defense was payment. Upon these issues, after trial to the court without a jury, findings of fact sustaining the defense of payment were made, and a conclusion of law and judgment in favor of respondent followed accordingly. No exceptions were taken

[1]Reported in 155 Pac. 1040.

or filed as required by law. Rem. & Bal. Code, § 882 (P. C. 81 § 671).

There is no contention, nor could there be any tenable contention, that the conclusion of law and judgment do not necessarily and validly follow from the findings of fact made.

Respondents move for an order to strike the statement of facts and affirm the judgment. In such condition of the record, following our uniform holdings, such must be the disposition of this case. *Rice v. Stevens*, 9 Wash. 298, 37 Pac. 440; *Fender v. McDonald*, 54 Wash. 130, 102 Pac. 1026; *Yakima Grocery Co. v. Benoit*, 56 Wash. 208, 105 Pac. 476; *Seattle Automobile Co. v. Stimson*, 66 Wash. 548, 120 Pac. 73; *Meacham v. Seattle*, 69 Wash. 238, 124 Pac. 1125; *Scott v. Union Machinery & Supply Co.*, 78 Wash. 201, 139 Pac. 218.

The statement of facts will be stricken, and the judgment affirmed.

MORRIS, C. J., MAIN, PARKER, and BAUSMAN, JJ., concur.

[No. 12996. Department Two. March 15, 1916.]

KLOCK PRODUCE COMPANY, Appellant, v. R. ROBERTSON *et al., Respondents.*[1]

SALES—CONTRACT—CONSTRUCTION—QUALITY OF GOODS. A contract for the sale of first government grade New Zealand creamery butter with government certificate attached to bill of lading, calls for grading in New Zealand and not for a Seattle or American certificate or grade.

ARBITRATION AND AWARD—CONTRACT — CERTAINTY — ENFORCEMENT. Under the rule that courts will not enforce contracts for arbitration where the intention is left in doubt, an agreement to arbitrate is not sufficiently clear to warrant enforcement, where, upon a sale of 1,500 boxes of first grade New Zealand butter, to be forwarded in five monthly shipments, the third shipment was found largely off grade and, the fifth shipment only remaining, the seller telegraphed offering to arbitrate in the event of the butter being off grade owing to keeping too long or improper handling, and the buyer replied requiring guaranty of payment in full at once for butter rejected by arbitrators, stating a preference to await arrival of butter and pay for that accepted, but finally did put up a letter of credit on receiving seller's reply "we agree to pay difference arbitrators decide on butter"; since it did not sufficiently appear what was to be arbitrated.

SALES—CONTRACT—MODIFICATION—ACQUIESCENCE IN DEPARTURE—EQUITABLE ESTOPPEL. Where, upon the sale of first government grade New Zealand butter under that government's certificate, without any provision for an American inspection or certificate, the third shipment, though certified, was found to be largely off grade, the conclusiveness of the foreign government certificate as to grade is waived and the seller is estopped to insist upon the original terms of the contract, where he acquiesced in the buyer's contention that it was off grade, and departed from the original contract by agreeing that the defective boxes be set aside and sold at prices agreed to by the seller, and they were accounted for on that basis.

SAME. The same would be true as to the fifth and last shipment which was partly off grade, and as to an agreement to arbitrate the differences, where the seller acquiesced in the claim that part was off grade, fixed the prices at which it was sold by the buyer, who accounted for such sales accordingly.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 8, 1915, upon findings in

[1]Reported in 155 Pac. 1044.

favor of the defendants, in an action on contract, tried to the court. Reversed.

Frank S. Griffith, for appellant.

Donworth & Todd and *Earnest Eddy*, for respondents.

HOLCOMB, J.—After some preliminary negotiations, on October 3, 1913, appellant and respondents made a written memorandum of sale of a large quantity of butter to be shipped from New Zealand to Seattle. The memorandum is as follows:

"Vancouver, B. C., Oct. 3rd, 1913.

"To Klock Produce Co., Seattle, Wn.

"We confirm sale to you to day of the following goods for account of ourselves

"1500 boxes (56 lbs.) First Govt. Grade New Zealand Creamery Butter free of preservatives at 13½d C. I. F. E. Seattle providing the freight rate is 1d Should the freight rate be 1⅛d the price will be 13⅝d per lb. C. I. F. E. Shipment monthly—October to February direct to Seattle via San Francisco. Letter of credit to be put up covering each shipment by the buyers. Government certificate attached to bill of lading. Butter to be paid for in full as soon as cleared by U. S. Government inspection against preservatives.

Robertson, Morris & Co.,
"Per D. Mahood.

"We accept and confirm the above order.

"The Klock Produce Co.,
"Per H. L. Klock."

The evidence shows that, by first government grade New Zealand creamery butter, was meant and intended butter inspected and certified by an agent of the New Zealand government, first grade being butter scoring 88 points or over. It is shown that the abbreviation "C. I. F. E." meant and was intended to mean Cost, Insurance, Freight, and Exchange. The paragraph in the memorandum, "Butter to be paid for in full as soon as cleared by United States Government inspection against preservatives," was inserted in the memorandum by the appellant after receipt by it from

respondents, but as so inserted was accepted by respondents.

There is some contention on the part of appellant that the clause in the memorandum "shipment monthly—October to February" did not mean to include any February shipment, but excluded that month, thereby making the contract mean that there were to be four monthly shipments. This contention, however, is not sustained, inasmuch as appellant itself, by H. L. Klock, in one or more letters, clearly stated that a shipment would be expected in February, thus showing that he understood the contract to be and to mean that there were to be five monthly shipments.

It is contended, also, by appellant that the butter was to be first-class at Seattle for the Seattle market. Such was the testimony of the appellant's principal witness, Mr. Klock, at the trial.

Generally speaking, the cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles. The parties should be bound for what they intended to be bound and no more. The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest. 6 R. C. L. 835. But it cannot be considered that the meaning or intent of one of the parties only would guide in the construction of the contract. From the memorandum itself it is easily ascertained that the grading referred to in the contract as first government grade New Zealand creamery butter is not to refer to first grade butter as established at Seattle. The memorandum provides that a government certificate shall be attached to the bill of lading. There could be no other government certificate attached to a bill of lading originating at the point of shipment, which was in New Zealand, than a government certificate of New Zealand. There could be no Seattle or American certificate there attached. Furthermore, there is testimony on the part of both a witness for appellant and witnesses for respondents that "first govern-

ment grade New Zealand creamery butter" means a grade fixed under the authorization of the government of New Zealand showing that the butter so graded scored 88 points or over.

The shipments were made at the times agreed. Complaint was made of the third shipment, shipped from New Zealand about December 6, 1913, and arriving in Seattle early in January, 1914, that 289 boxes of the butter of 56 pounds each were below the grade required. The fifth shipment from New Zealand, about the last of January, 1914, arriving in Seattle in February, was asserted by appellant to contain 355 boxes of 56 pounds each that were below quality. As to the first shipment complained of, the 289 boxes, there were 147 boxes scoring 88½, 101, scoring 89, and the rest scoring something over 90, as shown by the New Zealand certificate of inspection. There was no complaint of the fourth shipment, but before the arrival of the fifth shipment, appellant refused to put up the letter of credit required under the contract to cover each shipment, and, in reply to objections made to them, respondents sent appellant the following telegram:

"Jan. 31, 1914.

"Klock Produce Co., Seattle.

"Referring to 1500 boxes butter sold you for shipment by Moana January 31, in the event of the butter being off grade owing to having been kept too long or improper handling other than through defective transportation insurance covers latter we agree to submit to arbitration you appointing one man we appointing one they to choose third. Arrange letter of credit immediately."

To which appellant replied as follows by telegram:

"Jan. 31st, '14.

"Robertson, Morris & Co., Vancouver, B. C.:

"Before we place letter credit must have guaranty we will be paid in full at once for butter rejected by said committee or that you will pay difference of damage. You say you will submit to arbitration but do not say that you will make good the difference in money. We prefer wait arrival

butter paying only for that accepted. You and McEwan handle balance if any."

To this respondents replied by telegram as follows:

"January 31, '14.

"Klock Produce Co., Seattle:

"We agree pay difference arbitrators decide on butter Try get bank send credit today. This most important Notified McEwan credit being arranged."

The McEwan referred to in these communications was the New Zealand shipper of the butter.

Upon the understanding arising under these telegrams, appellant put up the letter of credit required under the contract, received the fifth shipment, and thereafter received and tested the shipment and found, as claimed by it, as stated heretofore, 355 boxes of butter below quality.

The issues as constituted by the pleadings in the cause are somewhat vague and perplexing. Appellant, without so stating, apparently relies upon a modification of the original contract by telegrams and letters and other oral communications between the parties. Respondents alleged and contended that the telegrams constituted an agreement in writing to arbitrate the differences between them, and that they appointed, or offered to appoint, their arbitrator, but that appellant refused to appoint any arbitrator except one Klock, a brother of the president and general manager of the appellant company and also a stockholder therein, and that, by reason of such conduct, there had been no arbitration, but that the agreement to arbitrate was duly made and should be enforced. With this the trial court seemed to agree. The trial court made a finding to the effect that respondents "offered to appoint an arbitrator, but the plaintiff suggested as its arbitrator one Klock, who is the brother of the manager and president of the plaintiff, and a stockholder in the plaintiff corporation, and has failed and refused to appoint any other arbitrator."

Appellant stated its causes of action apparently in one cause of action in seven paragraphs. It alleged the original contract, the shipment of the several shipments of butter, and the defective quality of the 289 boxes in the third shipment, alleging damages by reason thereof in the sum of $1,391.64; alleged the defective quality of the 355 boxes in the fifth shipment, and its damages by reason thereof in the sum of $1,742.92. It also, in another paragraph, set up the telegrams heretofore quoted, and alleged that the respondents refused to appoint an arbitrator or committeeman, rendering this action necessary; and that by reason of respondents' failure to deliver first grade New Zealand creamery butter according to their contract, loss and damage in the sum of $3,136.56 has been suffered. Another paragraph alleged damages in the sum of two dollars, balance due for money paid at the request of respondents to a chemist for having certain quantities of the butter analyzed for the detection of preservatives. Different constructions were placed by the parties themselves upon the telegrams referring to the matter of arbitration. Respondents contended that the telegrams meant only that they would arbitrate if the butter referred to by appellant on January 31, 1914, was off grade owing to having been kept too long, or from improper handling other than through defective transportation which insurance covered. They contend also that it refers only to the last shipment to be shipped from New Zealand on about January 31, 1914, and of this we can see no doubt. Appellant, on the other hand, contends that the telegrams constituted an agreement to arbitrate all the differences between the parties, including the 289 boxes in the third shipment.

"Courts will enforce contracts to arbitrate disputes and make the decision of arbitrators final where the parties to a contract make it clearly to appear that such was their intention; but whenever they leave it doubtful whether such a method of settling a disputed question was intended to be

left to the final decision of arbitrators, the construction is in favor of the right to resort to the courts for redress in the usual manner." *Van Horne v. Watrous*, 10 Wash. 525, 39 Pac. 136.

See, also, *Tacoma R. & Motor Co. v. Cummings*, 5 Wash. 206, 31 Pac. 747, 33 Pac. 507.

There is too much uncertainty about these telegrams as to what is to be arbitrated for the courts to attempt to enforce it as an agreement to arbitrate. If it were first to be determined whether the butter was off-grade owing to having been kept too long, or from improper handling other than through defective transportation, then it would appear there was nothing to arbitrate.

Had respondents stood upon the letter and terms of the memorandum of sale, there is no doubt whatever appellant could not recover. Appellant bought a certain article the quality of which was to be determined in a certain way; that is, by a certificate of government grade of New Zealand. There was no provision for inspection and certifying the grade in Seattle or by American inspection. When a certain method of ascertaining the quality of an article sold is provided by the parties, that method is conclusive and binding upon the parties. *Gratiot St. Warehouse Co. v. Wilkinson*, 94 Mo. App. 528, 68 S. W. 581; 35 Cyc. 316. But respondents did not adhere to the original terms of the contract, but, at the instance of appellant, departed therefrom and acquiesced in the contention of appellant that the third shipment contained 289 boxes of 56 pounds each of butter of defective quality. By agreement between them, the appellant set aside these 289 packages, and respondents then endeavored to sell them. They succeeded in disposing of forty packages to one concern, receiving the money for them and remitting the amount thereof to appellant. They also authorized an agent to make further effort to sell the butter, which effort failed. They then authorized and requested appellant to make sale of it for the best price obtainable. Ap-

pellant thereupon sold it for from 22 to 23½ cents per pound, and accounted therefor to respondents. The total loss on this shipment is shown to be $1,391.64.

As to the fifth shipment, of which the 355 boxes were claimed to be defective, although the argument of counsel for appellant is somewhat involved, as we gather, it is contended that, even though the agreement to arbitrate was not a sufficient agreement to arbitrate, it was a sufficient acquiescence in the contention of the appellant that the 355 packages of butter were defective in quality to constitute a departure from the original contract by which the certificate of grading by the New Zealand inspector would control, and create a new contract of liability. We are satisfied that such position was correct. Had the agreement to arbitrate been effected, it would have been for the express and only purpose of determining whether or not the 355 boxes of butter contained any butter of defective quality. But the agreement was not effected. On the contrary, it was abandoned. The tentative agreement to arbitrate referred to this shipment alone, and had nothing to do with the previous shipments. We must agree with the trial court that it was possibly prevented by the conduct of Klock alone in insisting on appointing an arbitrator who would be disqualified under the law by reason of his interest and bias, and objecting to respondents appointing any arbitrator, although not interested in the matter, who had in any way prejudiced the controversy.

Notwithstanding the respondents had departed from the contract and acquiesced in the rejection of the 289 boxes contained in the third shipment, they now proceeded to the negotiation with appellant for the disposition of the 355 boxes contained in the last shipment. It seems that they were doing everything within their power to satisfy appellant. One of the respondents came to Seattle upon notice of the rejection of the 355 boxes of butter, and first suggested that he would ship all of it to Brandon, B. C., where he had

a customer for a large quantity of butter. Later, however, it was discovered that he could not get the duty refunded if the butter was so shipped and, at his suggestion and request, the butter was placed by appellant in cold storage, where it was kept until respondents took 200 packages at twenty-five cents per pound and 120 packages at twenty-four cents per pound, and the balance was sold by the appellant for the respondents at different prices, and accounted for. The respondents fixed the prices of this butter and established the loss thereon. After such disposition of the butter in the fifth shipment, there was a loss of $1,742.92. There was a further sum of two dollars paid out by appellant, as before stated, for analyzing the first 289 boxes of butter or a part of them. There is ample evidence, and the trial judge observed, that the butter in the two shipments complained of was very poor in quality. We are of the opinion, therefore, that respondents are estopped to rely upon the original contract, and that the original contract was so modified by the parties after its partial performance that the appellant is entitled to recover.

The judgment is therefore reversed, with instructions to enter judgment for appellant.

MORRIS, C. J., BAUSMAN, MAIN, and PARKER, JJ., concur.

[No. 13006. Department Two. March 15, 1916.]

THE CITY OF EVERETT, *Respondent*, v. T. D. PHILLIPS, *Appellant*.[1]

CRIMINAL LAW—APPEAL—REVIEW—VERDICT. A conviction of driving an automobile while intoxicated cannot be set aside as based only on conclusions of the witnesses as to the accused's condition, where the evidence contra was equally in the nature of opinions and there was a conflict in the evidence.

CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE. Upon a conviction of driving an automobile while intoxicated, newly discovered evidence that, observed shortly before the accident, "he gave no indications of being intoxicated," is merely cumulative, and not ground for a new trial.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered February 13, 1915, upon a trial and conviction of violating a city ordinance. Affirmed.

S. A. Bostwick, for appellant.

Jesse H. Davis, for respondent.

HOLCOMB, J.—Appellant was convicted of driving an automobile while intoxicated in violation of ordinance No. 1,531 of Everett, within that city.

There is ample evidence to support the verdict of the jury, but appellant contends that he should have been granted a new trial upon the ground that the conflict of testimony between the witnesses was only a conflict of opinions, and that the only proper conclusion to be drawn from all the evidence was that "from the acts and conduct of appellant he had complete control of himself and of the automobile which he was driving."

Whether the statements of the witnesses as to appellant were conclusions or not, they were as positive for respondent

[1]Reported in 155 Pac. 1059.

that he was intoxicated as they were by his own witnesses that he was not. The jury resolved this conflicting evidence against appellant and, there having been no misdirection of the jury, there is no escape from the verdict.

Nor is there any error in the refusal of the court to grant a new trial upon the affidavits of two persons, not produced at the trial and not then known to appellant as having knowledge of the facts, that, ten or fifteen minutes before the collision which occasioned the arrest of appellant, each saw and observed him for some minutes and that he then "gave no indications of intoxication." Such newly discovered evidence was merely cumulative, and the court having exercised his discretion in regard thereto and found no justification for a new trial, we shall not. *State v. Bridgham*, 51 Wash. 18, 97 Pac. 1096; *State v. Fateh-Mohamed*, 76 Wash. 462, 136 Pac. 676; *State v. Gay*, 82 Wash. 423, 144 Pac. 711.

No error. Judgment affirmed.

MORRIS, C. J., PARKER, MAIN, and BAUSMAN, JJ., concur.

[No. 13022. Department Two. March 15, 1916.]

ANDY AMANN *et al.*, *Respondents*, v. ALEXANDER PANTAGES, *Appellant*.[1]

PRINCIPAL AND AGENT — AUTHORITY OF AGENT — EMPLOYMENT AND DISCHARGE. Authority by a "representative" of a vaudeville circuit to employ actors does not imply an authority to discharge them.

SAME—DISCHARGE BY AGENT—AUTHORITY—LIABILITY OF PRINCIPAL —TENDER OF SERVICE. Actors employed by a "representative" of a vaudeville circuit cannot rely upon a "discharge" by a brother of the representative employed in his office and maintain an action for breach of contract against the employer, where they made no effort to communicate with the employer or any tender of their services.

SAME—CONTRACT OF EMPLOYMENT—BREACH— DISCHARGE — TENDER OF SERVICES. Upon employment of actors in New York for services in a vaudeville circuit to open in a city in a Pacific coast state, tender of services in New York is bad, especially when accompanied by demand for transportation not provided for in the contract.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 20, 1915, upon findings in favor of the plaintiffs, in an action on contract, tried to the court. Reversed.

Ryan & Desmond, for appellant.

Hastings & Stedman, for respondents.

BAUSMAN, J.—Pantages, of Seattle, proprietor of a vaudeville circuit on the Pacific Coast, had at New York one Louis Pincus, who, both on his office door and in his stationery, described himself as "representative" of this circuit, and who engaged the actors Amann for performances to begin about three months later at Calgary. A written contract bore Pantages' name by this representative. The opening was then postponed by Pincus some ten days, and from Calgary to Spokane, after doing which he departed to Europe, while

[1]Reported in 155 Pac. 1070.

the Amanns, according to agreement, delivered their players' effects to his office.

Waiting in New York, they received, about a month before the opening date, a letter from one Harry Pincus, a brother of Louis Pincus, in which, stating that he did it by authority of Pantages, he "indefinitely postponed" their performances. This communication was undoubtedly a dismissal if Harry Pincus had the right to speak for Pantages. Now plaintiffs show no more than that this man was a "brother of Louis Pincus and that they had seen him in Louis Pincus' office three or four times." Nothing whatever enlightens us as to what rights his brother had given him or what authority he had habitually pretended to or exercised.

This will not suffice. Let us see in the first place what was the authority of Louis Pincus himself. He had not, Pantages says, so much as a right to employ. Plaintiffs, for their part, showing nothing as to his acts in general, are confronted in the instance by proof that he employed them only after submitting their proposals to Pantages. However, suppose Louis Pincus to have authority to employ, this would not give him, as agent or by mere force of law, authority to discharge. *Nielsen v. Northeastern Siberian Co.*, 40 Wash. 194, 82 Pac. 292. And that it is well that this is the law is clear in this very case. For it would plainly be beyond Pantages' intentions to let this agent discharge actors simply because he had either general or special authority to engage them. If he could do this at all, he might do it on the eve of the actor's departure from New York or after the actor had arrived in the West, and thus totally disarrange the circuit. In other words, concede an implied power of discharge, and when does it end?

As for the word "representative," that in itself is an uncertain term. We cannot say from that alone that authority either to employ or to discharge resulted, and plaintiffs have not shown what greater course of agency was tolerated by Pantages. But, as was stated, the dismissal here came

only from a brother of the representative. Is Louis Pincus shown to have had any right to delegate his authority? Not a word as to this. Pantages, for his part, denies that Harry Pincus had any connection with him whatever.

We are clear that plaintiffs had no right to rely on the actions of Harry Pincus. A telegram or letter from them to the principal was both easy and natural, and those who would run up heavy damages against the principal gave him a poor chance to speak for himself. We have here Pantages testifying that he awaited these actors in the West and knew nothing of the alleged discharge. To estop him there is neither usage nor acceptance of benefits nor ratification.

We see nothing in the actions of one Matthews to change this situation, nor in Louis Pincus' saying on his return that he would remedy the trouble. As to New York being the place to tender performance, we do not so construe this contract, which distinctly fixed the beginning of the services in the West. But if tender was proper in New York, it was a bad tender, for it was coupled with a demand for railroad tickets unauthorized by the contract, and it would still leave Pantages his right to dispute the unauthorized discharge.

The judgment, which was rendered by the court without a jury, is reversed, and the cause remanded with instructions to enter a dismissal of the action.

MORRIS, C. J., HOLCOMB, MAIN, and PARKER, JJ., concur.

[No. 13060. Department One. March 15, 1916.]

CARL WASMUND, *in his Individual Capacity, and as Administrator, Claimant, Appellant*, v. MAX WASMUND, *Adverse Claimant, Respondent.*[1]

BASTARDS—INHERITANCE—RIGHT. Under the common law an illegitimate child could not take as an heir, and the right to do so must rest upon statute, such statute being remedial only in the sense of giving the beneficiary a status in law.

SAME—INHERITANCE—COMMUNITY PROPERTY—STATUTES. Upon the death of the wife, her illegitimate child does not inherit one-half of the community property by virtue of the act of 1875, § 4 (Rem. & Bal. Code, § 1345) providing that every illegitimate child "shall in all cases be considered an heir to the mother" and shall inherit the estate in the same manner as if he had been born in lawful wedlock; in view of § 2 of the same act, which provides that on the death of one spouse, the community property should vest in the survivor, and the later enactment, Laws 1879 (Rem. & Bal. Code, § 1342) which provides for the descent of one-half of the community property in equal shares to the "legitimate issue" of the body of the deceased, and if there be no issue living then the same "shall all pass to the survivor;" since the history of the act shows the intent to exclude illegitimate issue from sharing in the community property, except by testamentary disposition or acknowledgment or adoption of the child, which was within the power of the parent to provide.

Cross-appeals from a judgment of the superior court for Pierce county, Clifford, J., entered August 5, 1915, upon findings in favor of the petitioner, adjudging a right of inheritance in the community estate of a deceased person. Reversed.

Stallcup & Stallcup (*Robert B. Nason*, of counsel), for appellants.

Frank H. Kelley and *Ralph Woods*, for respondent and cross-appellant.

CHADWICK, J.—Theresa, the wife of Carl Wasmund, died intestate leaving a community estate. The court found,

[1]Reported in 156 Pac. 3.

and we shall accept its finding, that Max Wasmund was born out of wedlock, prior to the time of the marriage of his mother to Carl Wasmund; and further, that Max was the sole heir of Theresa and entitled to the whole of one-half of the community property, subject to some qualifications not material to this discussion. The controlling question presented upon this appeal is whether an illegitimate child can inherit the community property of a deceased parent to the exclusion of the surviving spouse.

That the state may define the character of property and the tenure by which it is holden, will not be denied. It may also fix rules of descent. The rule of the common law was that an illegitimate child could not take as the heir, either of the putative father or of the mother, "for he can inherit nothing, being looked upon as the son of nobody." "The incapacity of a bastard consists principally in this, that he cannot be the heir to any one, etc." I Black. Com. 459.

So it is held in modern times that no man has an inheritable interest in an estate to which he is a stranger in blood, unless he inherit in virtue of some statute, or as Sir William Blackstone put it, following the text just quoted, "by the transcendent power of an act of parliament, and not otherwise, as was done in the case of John of Gaunt's bastard children by a statute of Richard the Second." The harshness of the common law rule, which was to some extent, if not entirely, "vicarious" in that it punished the child for the sin of the parent, has not met with general approval by legislative bodies in this country, and it is now the common thing to find statutes defining the status and fixing the interest of illegitimate children in the property of the admitted or acknowledged parent. We are not referred to any case where the courts have, in the absence of statute, questioned the rule of the common law or undertaken, by rule or construction, to enlarge the terms of such statutes if plain and certain in terms. Nor could they do so without violating one of the

first principles of statutory construction, that is, that a right that is created, as distinguished from a natural or existing right which is defined by statute, shall not be extended beyond its terms or beyond its necessary implications.

And while it is true, as we said in *In re Gorkow's Estate*, 20 Wash. 563, 56 Pac. 385, that such statutes are "remedial," they are not remedial in the sense that they are intended to furnish a remedy for some natural or inherent right, but only in the sense that the beneficiary is given a status in law that he may take advantage of existing remedies. Whereas to an illegitimate, being denied all social and civil rights at common law, the statute undertakes to give all that it can give, that is, the civil right to inherit under the laws of descent. Respondent's rights depend, then, upon the statutes of this state. If he falls within the laws of descent, he is an heir of his mother; if not, he takes no interest.

As preliminary to a discussion of the statutes, it may be admitted that respondent is an heir of his mother, Theresa Wasmund, and would be entitled to share in a distribution of her separate property. With that question we have no concern; the whole of the estate is community property. The community property system was adopted in this state in 1869.

"All property acquired after the marriage by either husband and wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property." Laws of 1869, p. 319.

The act of 1869 was rewritten and extended in 1871. Laws of 1871, p. 67. The definition of common property was retained. No rule of descent for community property was fixed by either the act of 1869 or 1871. In 1875, the legislature enacted a rule of descent for community property. It also noticed the incapacity of an illegitimate child, and fixed its status as an heir.

"Sec. 2. Upon the death of husband or wife, the whole of the community property, subject to the community debts,

shall go to the survivor, but nothing herein contained shall be construed to conflict with laws exempting property from attachment and execution, and specially the provision securing the homestead to the survivor, and all property except as an allowance for support of the family." Laws of 1875, p. 55.

"Sec. 4. Every illegitimate child shall be considered as an heir to the person who shall in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, and shall in all cases be considered as heir of his mother, and shall inherit his or her estate in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he shall not be allowed to claim as representing his father or mother, any part of the estate of his or her kindred, either lineal or collateral, unless before his death his parents shall have intermarried, and his father, after such marriage, shall have acknowledged him as aforesaid, and adopted him into his family, in which case such child and all the legitimate children shall be considered as brothers and sisters, and on the death of either of them intestate, and without issue, the others shall inherit his estate and he theirs as heretofore provided in like manner, as if all the children had been legitimate, saving to the father and mother respectively their rights in the estates of all the said children, as provided heretofore in like manner as if all had been legitimate." Laws of 1875, p. 55 (Rem. & Bal. Code, § 1345).

In 1879, the rule governing the descent of community property was qualified. It was provided:

"Sec. 13. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her or their bodies. If there be no issue of said deceased living or none of their representatives living, then the said community property shall all pass to the survivors, subject to the community debts, and to the exclusion of collateral heirs, the family allowance, and the charges and expenses of administration." Laws of 1879, p. 79.

See, also, Rem. & Bal. Code, § 1342.

The word "issue" had been theretofore defined in § 13 of the act of 1875 as "all lawful lineal descendants of the an-

cestor." The act of 1879 does not refer to the rights of an illegitimate child.

It was within the power of the legislature to place the whole of the community estate in the survivor, as it did in the act of 1875, or in the "legitimate issue," if any, of the deceased spouse, as it did in the act of 1879. Considering the history of the law, we have no doubt of its intention to exclude illegitimate issue. We are invited to consider the injustice of the common law rule and hold, inasmuch as an illegitimate child is always and "shall in all cases be considered as heir to the mother," that it was the intention of the legislature to raise an illegitimate to the rank of a legitimate inheritor. We may grant the injustice of the common law, but the statute is plain. We have no power to extend it beyond its terms. In the act of 1875, the rule of descent is fixed absolutely in the surviving spouse. In the act of 1879, the half of the estate is made subject to testamentary disposition; if no disposition is made by will and there be no legitimate issue, it goes to the survivor. If this were all, the contention of counsel might invite some remote doubt, but when it is remembered that in, and as a part of, the same act the legislature defined the right of an illegitimate to inherit at all in general terms, without qualifying the section referring to the descent of community property, we must assume that it had no intention to give to an illegitimate child any property other than the separate property of the parent.

While it may seem an unjust thing for the legislature to provide that an illegitimate cannot inherit the whole estate —the community property as well as the separate property—it is not entirely so, for, but for the statute, it could not inherit at all. And there are sound reasons to sustain the legislative intent as we find it to be. Our construction gives effect to every word of every act. We write nothing out of the law. Moreover, it is most likely that the legisla-

ture considered, having in mind that the community was a legal entity, the property being held by the whole as well as by the half and surviving to a spouse from the community rather than from the person of the deceased, that it would not be consistent with wise policy to distribute or destroy the entity by a grant to one who had no blood interest with the survivor; one who may be, and often is, an absolute stranger to the family, a "community" as it existed during the time the property was in process of building. It may have considered also that it was within the power of a parent to provide, under the statute of wills, for an illegitimate.

Taking the case at bar and fitting it to the entire law, we must assume that deceased was mindful of the statute and its terms. Instead of making a will, she relied upon the statute, as we must presume, which, in the absence of "legitimate issue," puts the estate in the hands of her surviving husband.

Counsel rely upon several decisions. In *In re Gorkow's Estate, supra*, the estate was the separate property of the deceased, and the heir had been acknowledged by the father. Gorkow died testate, and the questions confronting us were in no way involved. Neither does *In re Rohrer*, 22 Wash. 151, 60 Pac. 122, 50 L. R. A. 350, touch, in any way, the statutes of descent. *Griffin v. Warburton*, 23 Wash. 231, 62 Pac. 765, and *Warburton v. White*, 176 U. S. 484, are not in point. Children by a "former marriage" are legitimate issue and are clearly entitled to inherit the common property. Counsel also rely with much assurance upon cases from other states. In all of them the courts very properly followed a rule of liberal interpretation, the statutes being subject to interpretation. In the instant case, the statute being in no way doubtful, but plain and certain in its terms, we are not put to the necessity of interpretation or construction. We have only to declare the law as we find it.

Reversed and remanded with instructions to proceed with the administration of the estate without further interference on the part of the respondent.

MORRIS, C. J., MOUNT, FULLERTON, and ELLIS, JJ., concur.

[No. 13072. Department Two. March 15, 1916.]

WHATCOM COUNTY, *Respondent*, v. ALFRED L. BLACK, *Appellant*, AND NAMED OWNERS, *et al.*, *Defendants*.[1]

TAXATION—LIENS—FORECLOSURE—CERTIFICATES OF DELINQUENCY—RIGHTS OF HOLDER—FORFEITURE. Under Rem. & Bal. Code, § 9262, requiring the purchaser of a tax certificate of delinquency to pay subsequent taxes on pain of forfeiture of all rights to any subsequent purchaser who must redeem the prior certificates, with a proviso excepting counties or municipalities, a county need not redeem from prior certificates or liens, holders of which lose all lien rights by failing to pay subsequent taxes.

SAME—TAX LIENS—PRIORITY. As the latest tax lien is superior to liens prior in time, so far as the taxing body is concerned, a county foreclosure for one year only wipes out all prior delinquent taxes.

SAME—TAX LIENS—FORECLOSURE—NOTICE. Upon a county tax foreclosure, no personal service is required, where notice of publication is given in the manner required by Rem. & Bal. Code, § 9257, providing for notice "exclusively by publication in one general notice, describing the property the same as described on the tax rolls."

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered April 12, 1915, upon findings in favor of the plaintiff, in an action to foreclose tax certificates. Affirmed.

Black & Black, for appellant.

W. P. Brown and *Loomis Baldrey*, for respondent.

HOLCOMB, J.—Whatcom county instituted a general suit to foreclose liens for taxes on real property for the year

[1]Reported in 155 Pac. 1071.

1906, the liens being evidenced by certificates of delinquency issued by the county treasurer to it.

The case was entitled as above, except that appellant's name did not appear therein, nor in the summons, and the body of the summons described the numerous parcels of property separately as the same are described on the tax rolls, and contained the names of the owners thereof as they appeared on the rolls of the county treasurer's office.

The summons was served by publication only, in the manner and for the time required by law. Appellant is the holder by assignment of prior certificates of delinquency issued for taxes assessed against some of the property involved for the year 1902, and upon which he or his predecessors in interest paid taxes for the years 1903, 1904, and 1905, but suffered taxes for subsequent years, namely, 1906 and all years thereafter, to become delinquent. Certificates of delinquency for the subsequent years were accordingly issued to the county.

The county had judgment. No person appeared in the action save appellant, who first appeared specially and objected to the jurisdiction of the court over his person or the property against which he held tax liens as above mentioned, on the grounds (1) that no personal service of summons had been had against him, and (2) that the published summons failed to state the amount of taxes paid for prior or subsequent years.

The objections to the jurisdiction were overruled and appellant, reserving all rights under his special appearance, answered, setting forth substantially the same facts, and further, that, at the time of the bringing and still, certain suits on his behalf were and are pending in the same court for the foreclosure of the certificates of delinquency issued for the year 1902 and subsequent taxes, to and including 1905, and subsequently but before the institution of this action assigned by the holder to this appellant; that his delinquency certificates constitute prior and superior liens

against the properties involved herein; that none of the liens so held by appellant have been paid, and that at all times he was and is a resident of Whatcom county, Washington.

I. The first question raised by appellant is: "Can the county foreclose taxes for any one year without including in the action allegation covering, and a prayer asking for the foreclosure of, all taxes found to be due against the property in question, for all years for which taxes have not been paid?"

The rights of a holder of a certificate of delinquency are governed by this statutory provision (Rem. & Bal. Code, § 9262; P. C. 501 § 253):

"Every purchaser of a certificate of delinquency shall before applying for judgment, pay all taxes that have accrued on the property included in said certificate since the issuance of said certificate or any prior taxes that may remain due and unpaid on said property, and any purchaser of delinquent certificates that shall suffer a subsequent tax to become delinquent and a subsequent certificate of delinquency to issue on the same property included in his certificate, such first purchaser shall forfeit his rights thereunder to the subsequent purchaser, and such subsequent purchaser shall at the time of obtaining his certificate redeem said first certificate of delinquency outstanding by depositing with the county treasurer the amount of said first certificate with interest thereon to the date of said redemption and the amount so paid in redemption shall become a part of said subsequent certificate of delinquency and draw interest at the rate of fifteen per cent per annum from the date of payment. Said holder of a certificate of delinquency permitting a subsequent certificate to issue on the same property shall, on notice from the county treasurer, surrender said certificate of delinquency on payment to him of the redemption money paid by the subsequent purchaser: Provided, that this section shall not apply to counties or municipalities."

By this, if the holder of a certificate of delinquency allows subsequent taxes to become delinquent, he "forfeits his rights thereunder to the subsequent purchaser," but the subsequent

purchaser (except the county or municipality), at the time of obtaining his certificate, shall redeem the first certificate of delinquency outstanding by depositing the amount of the first certificate with interest to date of redemption, etc., with the county treasurer. But "these provisions shall not apply to counties or municipalities." Consequently the county does not have to redeem from prior certificates or liens; and prior lien holders, the same as prior holders of mere private liens, by virtue of the statute lose all lien rights by failing to pay subsequent taxes.

Even the holder of the fee ultimately loses his title by failure to pay taxes during the statutory period and the foreclosure of the lien therefor. The purchaser of a tax lien from the county cannot be in a better position than the holder of the legal title. If the contention of appellant were correct, he could purchase a certificate of delinquency for a certain year, refuse to pay subsequent taxes, fail or delay to foreclose his certificate, and bar the state and county from collecting its revenues, unless the county repaid or redeemed the prior certificate of lien. Assuredly this is not the effect or the intent of the law, and its plain language precludes any such construction.

II. The second query of appellant is this: "If the county is entitled to foreclose for one year only, does the foreclosure of the junior wipe out the senior delinquent tax?" As to tax liens, their superiority is in inverse order to other liens, the latest lien in point of time under the statute, if for a valid tax defaulted, being superior to liens prior in time, at least in so far as the taxing body is concerned. 2 Cooley, Taxation (3d ed.), p. 875.

The only reimbursement by the county to the purchaser of a prior certificate of delinquency provided by law is where the tax lien evidenced by his certificate is avoided or annulled in whole or in part under Rem. & Bal. Code, §§ 9252, 9253 (P. C. 501 §§ 237, 237a). To adopt appellant's contention would be to estop the county from enforcing its lien

for taxes for the default of a prior holder who, under the statute (§ 9262), must himself be estopped. He must continue to pay or forfeit his rights under his tax lien. In no other way can government continue to enforce collection of its taxes.

III. Lastly, it is questioned whether the court has jurisdiction over appellant, for the reason that no personal service was had upon him. The statute, Rem. & Bal. Code, § 9257 (P. C. 501 § 241), provides that, when tax liens are foreclosed by and in the name of the county, "the summons may be served or notice given exclusively by publication in one general notice, describing the property as the same is described on the tax rolls." That was done in this case, the statute being fully and literally complied with, and we have held that such service, the proceeding being purely one *in rem*, is sufficient. *Tacoma Gas & Elec. Light Co. v. Pauley*, 49 Wash. 562, 95 Pac. 1103; *Noble v. Aune*, 50 Wash. 73, 96 Pac. 688. No personal service of summons in the tax certificate foreclosure by the county is necessary where the statute providing for publication of summons is followed.

Decree is affirmed.

MORRIS, C. J., PARKER, MAIN, and BAUSMAN, JJ., concur.

[No. 13124. Department Two. March 15, 1916.]

GEORGE PAPPAS, *Respondent*, v. E. C. DAILEY, *Appellant*.[1]

APPEAL—REVIEW—GRANT OF NEW TRIAL—DISCRETION. An order granting a new trial on general grounds cannot be set aside on appeal where the court may have properly exercised its discretion on the point of the sufficiency of the evidence, which was conflicting.

APPEAL—RECORD—STATEMENT OF FACTS—AFFIDAVITS. An order granting a new trial cannot be reviewed on appeal where the affidavits used were not brought up by bill of exceptions or statement of facts.

Appeal from an order of the superior court for Snohomish county, Alston, J., entered February 3, 1915, granting a new trial, after the verdict of a jury rendered in favor of the defendant, in an action to recover personal property. Affirmed.

Clifford Newton and *E. C. Dailey*, for appellant.

S. A. Bostwick, for respondent.

BAUSMAN, J.—Defendant's appeal from an order setting aside a verdict in his favor. Why the learned judge directed a new trial, we are not advised by the record. Several statutory grounds were presented to him, but we have no indication as to which moved him, because his order was general. With his discretion we are unable to interfere, for if we should consider its exercise on the point of sufficiency of evidence to justify the verdict, we are confronted with a conflict of witnesses, and though, on the mere face of things, defendant appears entitled to the verdict, there is no such overwhelming preponderance one way as would justify us in substituting our opinion for that of the trial judge. As to the other grounds, these were in part accompanied by affidavits which have not been made part of the statement of facts, and under familiar rulings of this court, are not authenti-

[1]Reported in 155 Pac. 1059.

cated by the lower court as having been actually presented; but even if we should consider them, we do not find in them basis for reversal on abuse of discretion.

The order is affirmed.

MORRIS, C. J., PARKER, MAIN, and HOLCOMB, JJ., concur.

[No. 13162. Department Two. March 15, 1916.]

E. E. LITTLEFIELD, *Respondent*, v. F. A. BOWEN *et al.*, *Appellants*.[1]

ACTIONS—JOINDER—ARISING OUT OF SAME TRANSACTION. Where a broker was to be paid his commissions by the two parties to the exchange of properties, upon execution of the papers, and the exchange was prevented by the default of one of the parties, the broker may unite in one action a cause on contract for the half of the commissions to be paid, and another cause for damages in preventing the performance of the other party, under Rem. & Bal. Code, § 296, authorizing the joinder of causes of action that "arise out of the same transaction."

BROKERS—COMMISSIONS—CONTRACT — BREACH — LIABILITY. Where both parties agreed to unite in paying a broker's commission, upon the execution of papers effecting an exchange of properties, which was prevented solely by the default of one of the parties, such party is liable for the entire commissions.

RECORDS—RECORDING PAPERS—DAMAGES—CAUSING CLOUD ON TITLE. A broker is not liable in damages for causing the recording of a contract relating to his commissions upon effecting an exchange of properties, on the theory that it creates a cloud on title, as no legal rights are violated.

TENDER—WAIVER. Where a transfer by one party to an exchange of properties was refused by the other, tender of a deed is not necessary.

EVIDENCE—BEST AND SECONDARY—EVIDENCE OF TITLE. The rule that only the best evidence of title, i. e., the muniments of title such as deeds, etc., is admissible to show title applies only where the title is directly in issue, and not in an action for a broker's commission

[1]Reported in 155 Pac. 1053.

where it was only necessary to make a *prima facie* case by showing that a party was ready, willing and able to comply with a contract which called for a conveyange of the land by warranty deed.

EXCHANGE OF PROPERTIES—CONTRACT—TIME. Where a contract for the exchange of properties did not provide for its termination, a reasonable time is implied.

SAME — CONTRACT — BREACH — JUSTIFICATION. The fact that one party to an exchange notified the other that they would consider the contract terminated if not performed on a certain date, does not justify nonperformance by the other party, where it appears that negotiations extended beyond that time and ample time was given for performance, and after many objections to the form of the papers, performance was refused, regardless of any date previously fixed therefor.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered May 8, 1915, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Byers & Byers, for appellants.

Edgar S. Hadley, for respondent.

HOLCOMB, J.—Respondent, a real estate broker, as first party, one Thorniley and wife as second parties, and appellants as third parties, on September 23, 1914, entered into a written contract whereby the Thornileys and Bowens agreed to exchange certain properties at certain stipulated valuations, and each of the exchanging parties pay to respondent a certain stipulated commission, the same "being payable upon the execution of the instruments effecting the exchange." The "instruments effecting the exchange" were never executed by both parties to the exchange. The Thornileys claim to have been "ready, able and willing to perform and to have tendered performance to the Bowens, but that performance by them was refused by the Bowens, who also refused performance themselves."

Respondent brought his suit against appellants in two separate causes of action, upon the theory that they breached

the contract and rendered performance impossible by the Thornileys, and that appellants were therefore liable to him, both for the commission earned by him from appellants directly upon the agreed promise to pay, and for the commission earned from the Thornileys under the contract, because of appellants' breach of the contract. The contest is chiefly over the questions of whether in fact the Thornileys were ready, able and willing to perform their contract so as to bind appellants, and whether in fact the Thornileys, rather than appellants, breached the contract. Incidentally, the rulings of the court upon appellants' demurrer to the complaint and upon respondent's demurrer to the affirmative answer of appellants are urged as erroneous.

The tripartite contract, among other things, provided that each of the parties of the second part and of the third part were to furnish to the other an abstract of title covering their respective properties described in the contract, certified to date, allow five days for examination thereof, and to convey, each to the other, the properties so contracted, by good and sufficient warranty deed free and clear of incumbrances of every nature, except certain incumbrances against each which it was agreed the other would assume.

I. Appellants complain of the overruling of their demurrer to the complaint on the ground that two causes of action were improperly joined, one upon contract, and one upon tort; and that the complaint did not state facts sufficient to constitute a cause of action.

"The plaintiff may unite several causes of action in the same complaint, when they all arise out of . . . the same transaction." Rem. & Bal. Code, § 296, subd. 8 (P. C. 81 § 281).

See, also, *Harding v. Ostrander R. & Timber Co.*, 64 Wash. 224, 116 Pac. 635. The first ground of demurrer was not good.

It is further urged that, because the contract stipulated that "such amounts being payable upon the execution of the

instruments effecting the exchange" and the instruments of exchange were not alleged to have been executed, the respondent could not recover, and that therefore the complaint was insufficient.

Respondent could not compel appellants to execute the instruments, but alleged that the other contracting parties, the Thornileys, had been, and then stood, ready, able, and willing to execute their instruments of conveyance, and stood ready to complete the transfer of their properties in accordance with the contract, but that appellants refused such performance and refused to perform their (appellants') contract. In such posture of affairs, under such a contract, the respondent was entitled to recover his agreed compensation, to be paid by both parties, from whichever party refused to perform and rendered performance by the other party to the exchange impossible. The complaint, therefore, was sufficient and the demurrer was properly overruled.

II. Appellants attempted, by affirmative answer and cross-complaint, to claim damages against respondent for the recording of the contract involved herein, alleging that such recording cast a cloud upon their title, to their damage in the sum of $500. Demurrer thereto was sustained, and this is alleged as error. There could be no such recovery. No right, claim, lien, or estate in the real estate of appellants described in the recorded contract became actually or colorably established in respondent thereby. That one of the parties to a written contract voluntarily made by another party to it sees fit for some reason to procure its recordation in the public records violates no legal rights of the other party. There was no fraud, overreaching, or undue influence alleged or existing to avoid the contract. The demurrer to the affirmative answer and cross-complaint was properly sustained.

III. A deed was offered in evidence, executed by Thornileys and wife to appellant, of the real estate to be transferred

by the Thornileys as a tender under the contract. It appears that this deed had no revenue stamps as provided by the emergency revenue act of Congress of October 29, 1914. Objection was made to the introduction thereof for the reason that it was not competent evidence. We cannot find that the revenue act of Congress cited contains any provision that a deed or other such instrument not bearing the revenue stamp is inadmissible as evidence. The act provides only for a penalty for failure to attach such stamps. In any event, the evidence tends to show that the transfer by the Thornileys had been theretofore refused, and it was immaterial whether the Thornileys made any tender of a deed or not under such evidence.

Thorniley, a witness for respondent, while on the witness stand, after reciting a description of the property to be conveyed by him, was asked by counsel for respondent: "Was that your property?" To this appellants objected and the court sustained their objection, saying: "It is incumbent on you, Mr. Hadley, to prove your contention that you were able to convey it. If you had no title, and were not able to convey, you could not recover, so you will have to prove it." The witness was then withdrawn from the stand, and it is contended that there was no other evidence or offer of evidence tending to prove that Thorniley had title to the property in question. It is contended, also, that a witness cannot be permitted to prove ownership by simply stating the fact that he owns property, over the objection of the opposite party.

The first contention does not seem to be sustained by the record. While there were some complications concerning the title of Thorniley, there is evidence to the effect that these matters were all matters of adjustment, and that there had been transactions looking to the adjustment of all the matters which had been objected to by counsel for appellants, whereby it was testified by Thorniley and other witnesses that the title was rendered good. A peculiarity of the contract was

that, while the contract provided that abstracts should be delivered to and examined by each party, there was no provision in the contract that the property conveyed should be of perfect title or good and marketable title. The only provision relating thereto was that each party should give a good and sufficient warranty deed free and clear of incumbrances of every nature except those specified. There is evidence, however, although disputed, to the effect that the title was passed upon favorably by Mr. Byers, acting as attorney for Mr. Bowen, and that the defects pointed out were in the process of adjustment and curing; that, upon the curing of such objections, the title would be satisfactory. There is further evidence that these objections were met and the defects cured. There is further evidence that everything was satisfactory.

As to the other ground of the objection, it is, of course, a general rule that, when the title to real estate is directly in issue, the best evidence of title consists in the muniments of title such as deeds, mortgages, patents, wills, etc.; but when the title to real property is not directly in issue, or where only a *prima facie* showing of title is necessary, the rule as to best evidence does not apply and ownership may be proven by parol. 12 Ency. Evidence, 544. This action was not a suit to try the title of the property, and it was at best only incumbent upon respondent to make a *prima facie* case showing that Thorniley was willing and also able to comply with the contract entered into, and that appellants refused to comply therewith.

IV. What we have said applies also largely to appellants' fifth assignment of error, that the court erred in denying their motion for a nonsuit. As to that, it is argued that one of two things must be true: either the respondent did all the acts necessary to bring the parties together and was, therefore, entitled to a commission from each of them, or he failed to do the acts called for by the contract and was not entitled to a commission from either of them; that, in the

latter case, the motion for a nonsuit should have been sustained as to both causes of action, and in the former case, it should have been sustained as to the second cause of action. Authorities are cited to the effect that the duty of a broker employed to sell property is to bring the buyer and seller to an agreement. While it is not essential that he should be present and an active participator in the agreement or sale when it is actually concluded to entitle him to his commission, he must produce a purchaser ready and willing to enter into a contract on his employer's terms. He is not entitled to a commission for unsuccessful efforts to effect a sale, unless the failure is caused by fault of the principal. And further, that the burden was on the broker, in order to establish a *prima facie* case, to prove not only that the purchaser found was willing, but able to consummate the sale; citing: *Colburn v. Seymour*, 32 Colo. 430, 76 Pac. 1058; *Chaffee v. Widman*, 48 Colo. 34, 108 Pac. 995, 139 Am. St. 220; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441; *Gilliland v. Jaynes*, 36 Okl. 563, 129 Pac. 8, 46 L. R. A. (N. S.) 129; *Reynolds v. Anderson*, 37 Okl. 368, 132 Pac. 322, 46 L. R. A. (N. S.) 144; *Carter v. Owens*, 58 Fla. 204, 50 South. 641, 25 L. R. A. (N. S.) 736; *Riggs v. Turnbull*, 105 Md. 135, 66 Atl. 13, 8 L. R. A. (N. S.) 824.

There is no doubt these cases in general correctly state the law. But, on the other hand, these purchasers had already agreed upon their sale or exchange. They had entered into a written contract agreeing to make the exchange. The respondent was employed by, and was the agent for, both of them. His compensation had been adjusted. All that was required of him to do he had done. He could not compel either of the parties to make their title perfect or to convey when perfect. It has been held by this court that:

"A real estate broker who has procured a contract of sale to be entered into between the owner of land and a prospective purchaser may maintain an action for damages for the loss of his commissions against the purchaser for failure to

carry out such contract, although the broker had agreed to look to the vendor for his commissions." [Syllabus.] *Livermore v. Crane*, 26 Wash. 529, 67 Pac. 221, 57 L. R. A. 401.

This, then, supports respondent's action against appellants for their failure to carry out their contract, although, as to the commissions of the other party to the contract, he had agreed to look to the other party. The commissions payable by appellants were due under the terms of the contract directly if respondent had done all that was required by him, and without his fault the contract fell through. If the preponderance of evidence was with respondent on those questions, he was entitled to recover. The court so found, and we cannot say that the preponderance is the other way.

V. It is further urged that appellants took the initiative and, on November 10, 1914, fixed a time for the termination of the contract, to wit, November 16, 1914. The contract did not itself provide a time for its termination. In such case a reasonable time was implied. Appellants wrote a letter on November 10, 1914, notifying the Thornileys and respondent that, unless the contract of September 23, 1914, was fulfilled on or before November 16, they would consider it terminated. The evidence shows, however, notwithstanding that fact, that many negotiations were had between the Thornileys and appellants and respondent after November 16. If it had been abandoned, these subsequent transactions were inconsistent. They resumed or continued negotiations with the other parties, thereby leading them into the belief that the contract had not been abandoned and that it would probably be performed. On November 24, there was some negotiation between the parties looking toward the preparation of papers to be deposited in escrow until all the matters should be concluded. On December 12, a conference was had in which a modification of the exchange agreement was considered.

The testimony of Mr. Bowen himself tended very strongly to contradict the abandonment of the contract by their letter

of November 10. He testified that, two or three days after the expiration of the time specified in his letter, he talked with Mr. Thorniley again about it; that they were then and there arranging for the necessary papers to be placed in escrow, if such was thought advisable by Mr. Fullen (Thorniley's attorney) and Mr. Byers; that he knew then that there had been an arrangement for a loan whereby everything against the Thornileys' property would be cleaned up; that he objected to the form of a mortgage and note that had been prepared for him to sign; that he was advised not to give that mortgage; that he then decided he would not go through with the deal; that he saw Mr. Thorniley and told him he would not give that mortgage, and that they agreed if they could get the money somewhere else, giving a different form of mortgage, he would complete the deal; that Mr. Thorniley informed him about that time of an arrangement with a Mr. Keating whereby Keating would finance the matters against the Thorniley property, and that Thorniley was in position to convey the property with only the $12,000 incumbrance against it, according to the original agreement, but that he then told Thorniley that he considered the trade was all off; that his ground of objection was the form of the mortgage proposed for him and his wife to execute.

This and other evidence tends very strongly to support the finding of the trial court that appellants refused to perform the contract entered into, thereby rendering it impossible for the other parties to the contract to perform it, although ready and able. Other matters are argued incidentally by the briefs of counsel, but we think this is sufficient to justify the affirmance of the judgment.

Affirmed.

MORRIS, C. J., BAUSMAN, MAIN, and PARKER, JJ., concur.

[No. 13195. Department Two. March 15, 1916.]

O. E. NILSEN *et al.*, *Appellants*, v. EBEY LAND COMPANY *et al.*, *Respondents*.[1]

APPEAL—REVIEW—RECORD BELOW—INSTRUCTIONS—BILL OF PARTICULARS. Upon a case coming up on a bill of exceptions that includes only the pleadings and the instructions, a bill of particulars cannot amplify the complaint or be considered as proof, to start a presumption against the instructions.

Appeal by plaintiffs from a judgment of the superior court for Snohomish county, Alston, J., entered March 9, 1915, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

Vince H. Faben, for appellants.

Cooley & Horan and *R. Mulvihill*, for respondents.

BAUSMAN, J.—The complaint alleged a sale of "goods, wares, and merchandise" of reasonable and agreed value without stating what they were or on what precise dates they were sold, the only description being in a subsequent bill of particulars which contained many items of various dates. The answer, after denials, alleged, by way of rescission, that defendants had bought from plaintiffs an engine, which, being found worthless, was tendered back.

The case comes to us on a bill of exceptions which includes only the pleadings and the instructions. The substance of the latter shows that the jury was allowed to consider this engine as a separate article, whereas appellants claim that it was sold as part of a pumping plant, and that the rescission attempted was bad because the rest was not tendered too. In support of this, we cannot consider the bill of particulars at all, for we have held that such a bill neither is part of a complaint nor is traversed by an answer. It does not amplify a complaint. *Dudley v. Duval*, 29 Wash.

[1]Reported in 155 Pac. 1036.

528, 70 Pac. 68. We have consequently nothing before us to show whether these articles were sold as one plant and for an entire price. As the bill of particulars is not a pleading, so, also, it is not proof. It is a mere announcement of proposed details, which in this trial may or may not have been offered. In fine, we have neither pleadings nor evidence on which to start a presumption against the instructions.

Judgment affirmed.

MORRIS, C. J., HOLCOMB, MAIN, and PARKER, JJ., concur.

[No. 13251. Department Two. March 15, 1916.]

WILLIAM CASADY, *Respondent*, v. ERHARD ANDERSON, *Appellant*, WILLIAM SINN, *Defendant*.[1]

CONTINUANCE—CONDITION—DISCRETION. It is not an abuse of discretion to require the payment of $30 as a condition for granting a continuance, under Rem. & Bal. Code, § 484, authorizing a postponement of a trial on payment of a sum not exceeding ten dollars, besides fees of witnesses, where two prior postponements for the same cause (illness of defendant's wife) had been requested, the plaintiff and his wife as a witness had come some distance, and he had five other witnesses present, and the various expenses and costs were not itemized.

ASSAULT AND BATTERY—EVIDENCE—SUFFICIENCY. A verdict for an assault and battery is sustained by evidence of an affray engaged in by defendant's servant who was encouraged and assisted by the defendant.

SAME—PERSONAL INJURIES—DAMAGES—EXCESSIVE VERDICT. A verdict of $750 for an assault and battery is not excessive, where the defendant suffered a broken rib, a broken ear-drum, several other bruises and considerable pain with loss of sleep and loss of time for a period of two months.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered April 20, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Affirmed.

[1]Reported in 155 Pac. 1067.

Cooley & Horan and *R. Mulvihill*, for appellant.

E. C. Dailey and *Clifford Newton*, for respondent.

HOLCOMB, J.—Anderson, one of defendants, appeals from a verdict and judgment for $750, damages for personal injuries by an assault and battery.

I. Appellant claims that the trial court erred in refusing a continuance upon showing, at the commencement of the trial, of the illness of his wife at the time and for some time previously, and her inability to attend and testify in his behalf. The court granted the application for continuance upon terms that appellant pay into court for the benefit of respondent the sum of $30, which sum appellant refused to pay, and the continuance was denied.

Appellant quotes Rem. & Bal. Code, § 484 (P. C. 81 § 1295):

"When an application shall be made to a court or referee to postpone a trial, the payment to the adverse party of a sum not exceeding ten dollars, besides the fees of witnesses, may be imposed as the condition of granting the postponement."

It is asserted that the witness fees in this case could not have exceeded the sum of $15, but the court required the appellant to pay the railroad fare of respondent and his wife from some place east of the mountains, where they were residing. It is not plain upon what basis the allowance of terms was made. The court indicated that, inasmuch as from the appellant's showing his wife had been ill from May, 1914, and had requested two postponements prior to the one requested at the trial, being on March 19, 1915, which previous requests had been granted by counsel for respondent; that she had suffered a relapse eleven days prior to the date of trial, during which time her deposition could have been taken; that respondent had been obliged to come some distance and bring his wife as a witness for the trial, and had subpoenaed other witnesses who were present—if the con-

tinuance were granted he thought these expenses should be paid. Respondent had five other witnesses present. His counsel stated to the court that "maybe thirty dollars would cover it all," upon which counsel for appellant stated that he "refused to pay these costs."

No itemization of the various expenses and costs was required or made. We are unable to say, from this condition of the record, that the costs and expenses allowed as a condition of continuance were excessive, and therefore must assume that the court was within his discretion in imposing the sum mentioned as terms. While a suitor could not be allowed witness fees and mileage in such a case, it would certainly be just, where he was not at fault and was prepared on the day fixed by the court to go to trial, to allow him his necessary traveling expenses to and from the place of trial, as a condition of continuance.

II. It is insisted that the evidence was not sufficient to sustain any verdict against appellant, he contending that he did not commit any assault or damage. Appellant sent his servant (and codefendant), Sinn, to the house of respondent to obtain possession of some horses taken up for alleged trespass and damage upon the premises of respondent. An altercation ensued. Sinn assaulted the respondent twice with his fist. They then engaged in a struggle for a pitchfork, and during this struggle appellant arrived on the scene and directed the further proceedings, as well as assisting in the affray. He directed his employee to "go to him," "lay him out" and "I will stand the damages," at the same time occasionally striking respondent with a piece of wood about six feet long and three inches thick. This version of the contest, given by respondent under oath upon the witness stand, having been accepted by the jury as the true one, and no misdirection of the jury by the court being claimed by appellant, from the verdict of the jury there is no escape.

III. From the latter part of the affray, under appellant's personal direction and assistance, respondent suffered

a broken rib, a broken ear-drum, several other bruises, and considerable pain, with loss of sleep and loss of time for a period of about two months. An award of $750 for such damages is certainly not excessive.

There is no error. Judgment affirmed.

MORRIS, C. J., PARKER, and BAUSMAN, JJ., concur.

MAIN, J., concurs in the result.

[No. 13294. Department Two. March 15, 1916.]

THE STATE OF WASHINGTON, *on the Relation of Alfred H. Lundin, Prosecuting Attorney for King County, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Defendant*.[1]

JUDGMENT — MODIFICATION — MISTAKE — POWER OF COURT. After pronouncing judgment sentencing a convicted person to the state penitentiary, the trial judge has no power to modify the same so as to sentence the accused to the state reformatory, which was his intention in the first place, Rem. & Bal. Code, § 464, authorizing modification of judgments for "mistake, neglect, or omission of the clerk, or irregularity" not applying in such a case.

Application filed in the supreme court January 18, 1916, for a writ of prohibition to prevent the superior court for King county, Smith, J., from modifying a judgment and sentence; and a counter motion for leave to apply below for the modification. Writ granted, and motion denied.

Alfred H. Lundin and *Walter F. Meier*, for relator.

Welch & Dore, for defendant.

PARKER, J.—The relator, as prosecuting attorney for King county, seeks a writ of prohibition from this court commanding the superior court and Honorable Everett Smith, judge thereof, to refrain from vacating or modifying the

[1]Reported in 155 Pac. 1041.

judgment of that court sentencing Paul Schuman to the penitentiary.

In February, 1915, Paul Schuman was, by information filed in the superior court for King county, charged with a crime. His trial upon that charge resulted in a verdict of guilty. Thereafter motions for a new trial and in arrest of judgment being made in his behalf and by the court denied, on April 3, 1915, final judgment was rendered against him, which judgment, so far as we need here notice its language as appearing in the journal record thereof, reads as follows:

"Adjudged and decreed that the said defendant be punished by confinement at hard labor in the penitentiary of the state of Washington for the term of not less than six months nor more than five years."

On January 17, 1916, Honorable Everett Smith, the judge who presided at the trial and rendered the judgment and sentence against Schuman, informed the relator, as prosecuting attorney, that, unless prohibited by this court, he would modify the judgment and sentence so recorded, to the effect that Schuman be imprisoned in the state reformatory instead of the penitentiary. The judgment was appealed from by Schuman and affirmed by this court by our decision reported in *State v. Schuman*, 89 Wash. 9, 153 Pac. 1084, and the case was still pending in this court, in that the remittitur had not issued, when this application for a writ of prohibition was filed. At the same time that Judge Smith filed in this court his answer to the application of the prosecuting attorney for a writ of prohibition, counsel for Schuman also filed in this court an application for leave to file a motion in the superior court for a modification of the judgment and sentence as contemplated by Judge Smith. Arguments upon these two applications were heard together as one case.

The grounds upon which Judge Smith proposes to modify the judgment and sentence, and upon which counsel for Schuman rests his application, are sufficiently shown by the

statement of Judge Smith in his affidavit filed with his answer to the prosecuting attorney's application and Schuman's application, as follows:

"Affiant further says that at the time of the imposition of said sentence, it was his intention, and that it was his judgment that the proper sentence and the only sentence that should be imposed in said cause was a sentence of confinement of the said Paul Schuman in the state reformatory at Monroe, Washington, for a period of not less than six months nor more than five years.

"That it was the intention of your affiant to pronounce such sentence, and that from April 3, 1915, until after the rendition of the opinion of this court in said cause on December 23, 1915, it was the belief of affiant at all times that he had sentenced the said Paul Schuman to serve a term of not less than six months nor more than five years in the state reformatory at Monroe, Washington;

"That at the time of the imposition of said sentence, and at no time since, and at this time it is not the belief or the judgment of your affiant that it would be a just thing to confine Paul Schuman in the state penitentiary, or in any other place than the state reformatory at Monroe, Washington;

"Affiant further says that he is unable to state, of his own knowledge, whether or not, in passing sentence upon said Paul Schuman, he mistakenly used the words 'In the penitentiary,' instead of the words 'In the state reformatory.' "

The affidavits of the prosecuting attorney and his deputy who were present in court when Judge Smith pronounced the judgment, and the affidavit of the deputy clerk of the superior court of King county, who was present when Judge Smith pronounced the judgment and who recorded the judgment in the journal, render it certain that the record judgment from which we have above quoted is in terms exactly as it was pronounced by Judge Smith orally from the bench.

In their last analysis, this proposal of Judge Smith to modify the judgment, and the application of counsel for Schuman for leave to apply to the superior court for such modification, constitute an effort to modify a final judgment

long after its rendition and proper entry by the clerk, upon the sole ground that the court intended to render a different judgment than that which it actually did render. That a trial court has no power to vacate or modify its final judgment after the announcement and the proper final entry thereof, in the absence of a showing of some statutory ground for such vacation or modification, has been determined by numerous decisions of this court. *Coyle v. Seattle Electric Co.*, 31 Wash. 181, 71 Pac. 733; *Warren v. Hershberg*, 52 Wash. 38, 100 Pac. 149; *State ex rel. McConihe v. Steiner*, 58 Wash. 578, 109 Pac. 57; *Okazaki v. Sussman*, 79 Wash. 622, 140 Pac. 904; *Paich v. Northern Pac. R. Co.*, 86 Wash. 379, 150 Pac. 814.

The only statute we have, authorizing the vacation or modification of judgments after their final entry, is found in Rem. & Bal. Code, § 464 *et seq.* (P. C. 81 § 1163). Among the eight enumerated statutory causes found in § 464 for vacation or modification of judgments, we do not find any authority whatever for the disturbing of a final judgment upon the ground here urged. Subdivision 3 of that section comes nearer furnishing such authority than any of the others, but that falls far short of furnishing such authority. It reads:

"For mistakes, neglect, or omission of the clerk, or irregularity in obtaining the judgment or order;"

It seems quite plain to us that the word "mistake," as used in this statute, has no application to such mistake of the judge in pronouncing judgment as is here relied upon for modification of this judgment. The unexpressed intention of the judge, and his memory thereof, cannot be invoked to change the judgment which he orally pronounced, and which was duly recorded as orally pronounced, as in this case.

If, as a matter of fact, any injustice has been done to Schuman by this judgment of the superior court, it is now too late for remedy by the superior court. The executive

branch of the government is, of course, empowered to furnish such remedy as executive clemency may dictate.

We conclude that a writ prohibiting the superior court from modifying its judgment should issue as prayed for. It is so ordered. We also conclude that we cannot lawfully grant Schuman's application for leave to apply to the superior court for a modification of its judgment, and his application is therefore denied.

MORRIS, C. J., MOUNT, HOLCOMB, and BAUSMAN, JJ., concur.

[No. 12677. *En Banc.* March 17, 1916.]

C. T. BELCHER *et al.*, *Appellants*, L. B. YOUNG *et al.*, *Plaintiffs*, v. F. A. YOUNG *et al.*, *Respondents*.[1]

CHATTEL MORTGAGES—VALIDITY—AFFIDAVIT OF GOOD FAITH—CREDITORS—STATUTES. Under Rem. & Bal. Code, § 3660, declaring that a chattel mortgage without a mortgagor's affidavit of good faith is void "as against creditors of the mortgagor or subsequent purchaser, or encumbrancers of the property for value and in good faith," such a mortgage is void as to creditors regardless of notice, and a creditor does not lose his status as such by subsequently taking security and becoming an "encumbrancer" with notice of the prior mortgage.

TRUSTS—EXPRESS TRUSTS—PAROL EVIDENCE. Where a deed was given to the grantee as "trustee," intending to create an express trust as security for a debt to a stranger to the deed, it is not competent to prove the trust by parol.

MORTGAGES—DEED AS MORTGAGE. A deed by a stranger, without consideration, to a stranger to the debt, cannot be held to be a mortgage.

TRUSTS—FAILURE OF PROOF—RESULTING TRUST. Where an express trust, without any new consideration between the parties, fails for want of proof, there is no resulting trust in favor of the grantee; but the trust, if any, is in favor of the grantor holding the equitable title, where the grantee waives all personal interest.

APPEAL—REVIEW—THEORY OF CASE. Where a bank undertakes to foreclose a deed, given to a trustee, as a mortgage securing its debt,

[1]Reported in 155 Pac. 1060.

it is estopped to claim on appeal that the deed was absolute and has not been overcome by clear and certain proof; as a case cannot be tried on a new theory first advanced on appeal.

Appeal from a judgment of the superior court for Skamania county, Darch, J., entered August 15, 1914, upon findings in favor of the defendants, in an action in equity, tried to the court. Affirmed.

Arthur P. Tifft, H. K. Sargent, Ed Mendenhall, and *J. N. Pearcy,* for appellants.

Raymond C. Sly and *W. H. Wilson,* for respondents.

CHADWICK, J.—This is an action to determine the rights and priorities of several mortgagees to certain property in Skamania county, known as the Collins Hot Springs. The material facts are not in dispute and, as the appeal presents but two questions of law, both of which may be stated without detailed reference to the particular circumstances out of which they arise, we shall refer to the evidence only when necessary in the discussion of the questions of law.

The first question arises thus: The respondents, F. A. Young and Eliza Young, purchased the buildings and other personal property on a leased tract of land and gave a note and mortgage to Belcher, the vendor, to secure a part of the purchase price. This mortgage lacked the affidavit of good faith required by Rem. & Bal. Code, § 3660 (P. C. 349 § 3), which is as follows:

"A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchaser, and encumbrancers of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, and it is acknowledged and recorded in the same manner as is required by law in conveyance of real property."

Subsequently the respondents Young gave notes and a second mortgage on the same property to other persons to

secure a prior indebtedness. Still later, they gave a note to the Eastern Oregon Banking Company to cover a prior indebtedness, and procured an assignment by the second mortgagees of their notes and mortgage to secure the note given to the bank. In due time the bank proceeded to foreclose this second mortgage, ignoring the first mortgage, and the precise question is whether the first mortgage is void as to the holders of the second mortgage by reason of the absence of an affidavit of good faith.

The appellant Belcher, the first mortgagee, contends that it is not, because the second mortgagees took their mortgage with knowledge of the first mortgage, and they are therefore neither creditors nor incumbrancers in good faith within the meaning of the statute, and not being persons whom the statute protects, they may not take advantage of the insufficiency of the prior mortgage. He contends that, under our holdings in *Mendenhall v. Kratz*, 14 Wash. 453, 44 Pac. 872; *Hicks v. National Surety Co.*, 50 Wash. 16, 96 Pac. 515, 126 Am. St. 883; *Thomas v. Grote-Rankin Co.*, 75 Wash. 280, 134 Pac. 919, the insufficiency of the first mortgage does not invalidate it as to incumbrancers or purchasers, except they become such in good faith and without notice of the preexisting mortgage, and that this interpretation of the statute has established a rule of property which will protect vested rights acquired in reliance on that interpretation, and that they have such vested rights which are affected. But whatever the merits of this contention, it will apply in this case only if the second mortgagees are incumbrancers with notice as in the *Mendenhall* case. In that case, Judge Anders noticed the distinction between the effect of an insufficient mortgage as to incumbrancers and as to creditors, saying:

"As to the former [creditors] it positively declares that chattel mortgages are void unless they are accompanied by the specified affidavit and are acknowledged and recorded as required by law."

We have previously noted that the second mortgage was given to secure a debt owing to the mortgagees by the mortgagors. At the time the mortgage was given, the mortgagees were creditors of the mortgagors and, by the express terms of the statute, the first mortgage was void as to them because of their status as creditors. But the appellant Belcher contends that they cannot occupy the position of creditors as to whom the mortgage is void, and that of subsequent incumbrancers with notice as to whom it is valid, enjoying the privileges of both classes without sharing the burdens incident to either. As creditors, he argues they would only be entitled to collect their debt in the ordinary manner of obtaining a judgment and execution thereon, and as second mortgagees with actual knowledge of the first mortgage, they are not entitled to the protection of the statute, and their mortgage is inferior to the insufficient mortgage.

To reach this conclusion, however, we must find that the second mortgagees lost their status as creditors when they accepted the mortgage as security for the debt. This question was before us in *Smith v. Allen*, 78 Wash. 135, 138 Pac. 683, Ann. Cas. 1915 D. 300. In that case, Allen was a creditor of the mortgagor, and we held that, by accepting a mortgage as security for his debt, he did not lose his right as a creditor and become an incumbrancer against whom the prior defective mortgage was valid, but that he became an incumbrancer "for value and in good faith" as to whom the defective mortgage was void. We are satisfied that that ruling fully meets the contentions of appellants in this respect. The bank, assignee of the second mortgage, occupies the same position as Allen did, and as to it, the appellants' mortgage is void.

The second question arises out of the following state of facts. On May 11, 1911, F. A. Young and Eliza Young were indebted to the appellant bank in the aggregate principal sum of about $21,000, evidenced by promissory notes. These notes were assembled and a new note payable on de-

mand for $25,000, the amount then due, was signed by F. A. Young and Eliza Young. On May 4th, 1911, L. B. Young and George A. Young, parents of F. A. Young, made a warranty deed to a quarter section of land in Skamania county, to J. C. Ainsworth, trustee, for a recited consideration of ten dollars. The deed is, in form, a common law deed with full covenants of warranty. After these transactions, F. A. Young and Eliza Young made a mortgage upon the same property to secure a note in favor of the mother and father. This note and mortgage was thereafter assigned by them to respondent banking company, and it is now held by it as collateral to its debt.

The appellant bank brought this action to foreclose the deed as a mortgage, alleging that it was given to secure the indebtedness of F. A. Young and wife. Ainsworth joins in the complaint, and by subscribing to its allegations, has waived the right to assert any personal interest in the property or in the debt. The court below denied the relief sought.

The bank contends that the deed creates a trust in favor of the bank; that, if the consideration moved from the bank and the title was taken in the name of Ainsworth, a resulting trust arises in favor of the bank; that the deed is a mortgage, and that the deed is a deed absolute; the last contention being that the word "trustee," the only word in the instrument suggesting a trust, will be rejected as *descriptio personae*.

We have given the record our earnest consideration. After mature deliberation, we have no doubt that it was the intention of the parties to create an express trust in favor of the bank. The deed was made by strangers to the bank. It is not now contended that there was an actual consideration moving to the grantors or that the grantee had any personal interest in the transaction. We are not informed "in writing" as to the terms under which Ainsworth was to hold the property; whether he was to sell it and if so, at what time or upon what terms, or whether it was a trust for all

creditors or the bank alone. There is no separate instrument defining the trust, nor is there a definition of it in the deed. To show what the parties intended to do, resort must be had to parol testimony. This cannot be done. *Holly Street Land Co. v. Beyer*, 48 Wash. 422, 93 Pac. 1065; *Spaulding v. Collins*, 51 Wash. 488, 99 Pac. 306; *Pilcher v. Lotzgesell*, 57 Wash. 471, 107 Pac. 340; *Kinney v. McCall*, 57 Wash. 545, 107 Pac. 385; *Kalinowski v. McNeny*, 68 Wash. 681, 123 Pac. 1074; *Arnold v. Hall*, 72 Wash. 50, 129 Pac. 914, 44 L. R. A. (N. S.) 349; *Nichols v. Capen*, 79 Wash. 120, 139 Pac. 868.

By the same reasoning that supports the universal holding that an express trust cannot be proved by parol, it is held that an express trust that fails for want of proof will not be held to be a resulting trust in favor of the grantee except in certain cases. To so hold would defeat the rule.

Neither can a deed made by a stranger, without consideration, to a stranger to the debt be held to be a mortgage. Before we can come to a consideration of either of these theories, that of resulting trust or mortgage, we must find that the trust intended, that is, an express trust to hold the property as security for the debt and for the benefit of the bank, has failed for want of that character of proof that the law demands. We may as well admit parol proof of the terms of the trust in the first place, as to hold that the express trust having failed for want of proof, a trust results which may be defined by parol. Such a ruling would permit an evasion of the statute by indirect methods, and, by a mere juggling of terms, the accomplishment of the very thing which is condemned by the statute of frauds.

If this were a purchase of land by the bank, it paying the purchase price and taking the legal title in the name of another, or if the deed were taken upon a new consideration, or if there had been an extension of time for the payment of the debt, or if there had been an assumption of the debt by the

grantors, equity would declare a resulting trust in favor of the bank and against the grantee, or that the property was mortgaged although the contract rested in parol. But such is not the case. The bank gave up nothing and the grantors gained nothing. *Kansas Mfg. Co. v. Gandy*, 11 Neb. 448, 9 N. W. 569, 38 Am. Rep. 370.

There was no new consideration given by appellant bank, and the trust is repudiated by one who stands in the shoes of the grantors, against whom no trust can result, for it is one of the first principles of equity that a resulting trust arises from the acts of the parties and the implications of the law arising out of such acts, and exists from the time the legal title is taken and rests in the grantee.

"No oral agreements, and no payments, before or after the title is taken, will create a resulting trust, unless the transaction is such at the moment the title passes that a trust will result from the transaction itself." Perry, Trusts (6th ed.), § 133.

The holdings that the payment of the purchase money, or a new consideration, will create an implied or resulting trust in favor of the one paying the purchase price or giving the new consideration, which may be proved by parol, rests upon the same principle as the right to prove that a deed, absolute in form, may be shown by like proof to be a mortgage. It is an exception to, and at the same time an aid to, the general rule, that is to say, that equity will always intervene to protect the equitable title. An express trust failing for want of proof, the trust, if any, results in favor of the holder of the equitable title, and not in favor of the holder of the legal title. 3 Pomeroy, Equity Jurisprudence (3d ed.), § 1032.

All that we can make out of the case is that the parties have undertaken to create an express trust, and as against the holder of the equitable title, the trust has failed for want of competent evidence to sustain it.

Seemingly in anticipation of our holding, counsel upon the reargument advanced the theory that, in any event, the deed

is absolute, and has not been overcome by clear and certain proof. We think the appellant bank is in no position to urge this contention. It is estopped by its pleadings and its proofs. We have held that we will not permit a case to be tried upon a theory advanced for the first time in this court. *Dodds v. Dodds*, 51 Wash. 293, 98 Pac. 748; *Powers v. Munson*, 74 Wash. 234, 133 Pac. 453.

But if we were to hold that the deed was absolute, it would be to say only that it was *prima facie* so. The case would have to be remanded with permission to frame an issue. The apparent inadequacy of the consideration would admit proof of the real agreement of the parties, and we would, in the end, come to the same holding; that is, that an express trust was undertaken and has failed.

Judgment affirmed.

MORRIS, C. J., HOLCOMB, ELLIS, MAIN, BAUSMAN, and PARKER, JJ., concur.

[No. 13182. Department One. March 17, 1916.]

HUGH McGINLEY *et al.*, *Respondents*, v. MARY J. CANNON *et al.*, *Appellants*.[1]

MORTGAGES—ABSOLUTE DEED AS MORTGAGE—EVIDENCE—SUFFICIENCY. An absolute deed of a half interest in real estate from M. to C. who were equal partners in the property, for an express consideration of $26,200, is shown to have been intended as a mortgage for advances made by C. to M., where it appears that, two years later, the parties had a settlement, and C. agreed to convey to M. a half interest in the property upon payment of $17,200, with interest, the contract providing that meanwhile they should be tenants in common and that upon the death of either the survivor should have the right to purchase the half interest belonging to the estate at the appraised value, it further appearing that one purpose of the original deed was to permit C. to borrow money on the property and to prevent M. from incumbering it.

TENANCY IN COMMON—LEASE TO COTENANT—LIABILITY FOR RENT—TITLE—MERGER. Where a tenant in common, holding the full legal title, made a lease and afterwards purchased the lease on his own account and thereafter held exclusive possession under the lease, accounting for the stipulated rents during his lifetime, the lease was not merged, and his estate, holding over, is properly charged with the rents stipulated in the lease.

Appeal from a judgment of the superior court for King county, Albertson, J., entered July 21, 1915, in favor of the plaintiffs, in an action to determine the ownership of real property and for an accounting, tried to the court. Affirmed.

William Martin and *Myers & Johnstone*, for appellants.

Farrell, Kane & Stratton and *Preston & Thorgrimson*, for respondents.

MOUNT, J.—This action was brought by the plaintiffs, claiming to be the owners of a one-half interest in certain real estate in Seattle; and for an accounting for rents, issues, and profits of the property after the year 1906. The case was tried to the court and resulted in a decree to the effect

[1]Reported in 155 Pac. 1047.

that the plaintiffs were the owners of an undivided one-half interest in the property, subject to a mortgage of $16,000, after the payment by the plaintiffs to the defendants of the sum of $9,012.41, which the court found was owing from the plaintiffs to the defendants. The defendants have appealed from that judgment.

The facts are, in substance, as follows: Prior to the year 1902, the plaintiff Hugh McGinley and John Cannon, now deceased, were partners, mining in Alaska. This mining partnership had been successful. Both partners came to Seattle in the year 1902 and purchased parts of two lots at the southeast corner of Fourth avenue and Yesler Way, in the city of Seattle, for $22,500. They thereupon constructed a three-story building upon this property. The plaintiffs claim that the building cost $70,000; and the defendants claim that it cost about $45,000. The partners borrowed certain sums of money which were expended in the construction of the building. The building was completed, and thereafter, in March, 1903, Mr. McGinley returned to Alaska for the purpose of mining upon the partnership account. He took with him about $800 of partnership funds. After he had been in Alaska a short time, he drew upon Mr. Cannon in Seattle for the sum of $5,000. This money was sent to Mr. McGinley by Mr. Cannon. About a month later, Mr. McGinley again drew upon his partner in Seattle for $10,000. This money was also sent by Mr. Cannon. While Mr. McGinley was in Alaska, Mr. Cannon had charge of the building which had been constructed in Seattle. He collected the rents and paid the bills against the property. It is conceded that Mr. McGinley lost the money which had been sent to him in Alaska. Mr. Cannon, becoming anxious for fear the Seattle property would become incumbered, sent a deed to Mr. McGinley to be executed, conveying McGinley's interest in the property to Mr. Cannon. This deed was executed and returned to Mr. Cannon. At the time the deed was executed, the consideration for it was left blank. After

it was received by Mr. Cannon, he caused to be inserted $26,200 as the consideration for the deed. The deed was thereupon recorded in King county.

Afterwards, in the year 1906, upon Mr. McGinley's return to Seattle from Alaska, a settlement was had between the partners, and a contract was entered into as follows:

"This agreement made and entered into at Seattle, Washington, by and between John Cannon, party of the first part, and Hugh McGinley, party of the second part:

"Witnesseth: That said party of the first part does, for and in consideration of the amount, and the covenants and promises hereinafter stated grant, bargain, sell and convey unto the said party of the second part, and his heirs only an undivided one half (½) interest in and to the west one-half (½) of lots one (1) and two (2) in block thirty-six (36), D. S. Maynard's plat of the town (now city) of Seattle, according to the plat thereof now on file in the auditor's office of King county, Washington.

"The conditions for and the condition upon which the foregoing conveyance shall become effective and pass title to the said undivided one-half interest in said property from the said party of the first part to the said party of the second part are as follows, to-wit:

"(1) That said party of the second part shall pay to said party of the first part the sum of seventeen thousand two hundred ($17,200) dollars, at the rate of at least one thousand ($1,000) dollars per year, with interest thereon at the rate of 6% per annum until the full amount of said sum of seventeen thousand two hundred ($17,200) dollars has been fully paid.

"(2) That said party of the second part is not to file or record this agreement, except in case of the death of the said party of the first part; and that the name of the said party of the second part shall not appear of record as owning any interest in said described property until the termination or expiration of this agreement, except in case of the death of the said party of the first part prior thereto.

"(3) That this contract and agreement is not transferable, and that the aforesaid interest contemplated to be conveyed by this agreement shall not in any manner be incumbered, mortgaged, sold or assigned under any circumstances,

and any attempt so to do on the part of the party of the second part shall constitute a breaking and violation of this agreement and a total failure of consideration therefor, in which event this agreement shall become null and void, and no title or interest of any character or kind shall be transferred or conveyed or pass from said party of the first part to the said party of the second part by this contract or agreement, and the same shall become null and void and to the same effect as though the same had never been executed and leave the title to the whole of said property in the said party of the first part, his heirs and assigns.

"(4) It is further hereby mutually agreed, that in case of the death of the said party of the second part that his said undivided one-half interest in said property shall descend to his heirs, or pass to the legatees under his last will and testament, subject, however, to the payment of the said sum of seventeen thousand, two hundred ($17,200) dollars, with interest thereon as aforesaid.

"(5) It is hereby further mutually agreed that the said party of the first part shall have the right to grant, bargain, sell, and convey the whole of the aforesaid property to the same effect as though this agreement had not been entered into, in which event said party of the first part hereby agrees to account and pay to said party of the second part from any amount realized from the sale of the same one-half of the net amount received, less the whole or such part of the said sum of seventeen thousand two hundred ($17,200) dollars as shall remain unpaid by said party of the second part to said party of the first part at the time at which said sale is made.

"(6) It is hereby further mutually agreed that in case of the death of either of the parties to this agreement, that the survivor shall have the right to purchase the interest of the other party by paying to his executors, administrators, heirs, or legatees under his last will and testament the appraised value of said one-half interest in said property.

"(7) This agreement and the interest of the parties hereto in and to the west one-half (½) of lots one (1) and two (2) block thirty-six (36) D. S. Maynard's plat of the town (now city) of Seattle, King county, Washington, shall be construed and held to be tenants in common and their in-

terest therein to pass to their respective heirs, or under their last will and testament to the legatees thereof.

"In Witness Whereof said parties have hereunto set their hands and seals this 3rd day of February, A. D. 1906."

This instrument was duly signed and acknowledged.

Thereafter Mr. Cannon had the complete management and control of the property. In the fall of that year Mr. Cannon leased the hotel portion of the building, including a room which was used for a saloon, to a Mr. Sheehan, for a term of five years, at the rate of $6 per month per room (there were some eighty-two rooms in the building), and $100 per month for the room to be used for a saloon. This lease was made with the consent of Mr. McGinley. At the time this lease was made, Mr. Cannon and Mr. Sheehan formed a partnership to operate the hotel and the bar. This partnership continued the operation of the hotel under the lease until Mr. Sheehan's death in the year 1909. After Mr. Sheehan's death, Mr. Cannon purchased from his estate his interest in the lease and the furniture which that partnership then owned in the hotel and continued to operate the leased building in the same way it had been previously operated by himself and Mr. Sheehan. After Mr. Sheehan's death, the rents were charged as before, and accounted for by Mr. Cannon.

Thereafter, in March, 1912, Mr. Cannon died. After his death, his executors rendered a statement of the rents on the same basis which had been paid by Mr. Cannon during his lifetime. After Mr. Cannon's death, his executors denied that Mr. McGinley had any interest in the property, and claimed the whole thereof as belonging to Mr. Cannon's estate. Thereupon this action was brought.

The appellants argue that the court erred in adjudging Mr. McGinley to be the owner of an undivided one-half interest in the property. The deed which was executed by Mr. McGinley to Mr. Cannon in the year 1903 purports upon its face to be an absolute deed for a consideration of $26,200. It is argued by the appellants that, if this deed was a trust

deed, the trust was an express trust and cannot be proven by parol. We need not enter into a discussion whether the deed created an express trust. We think it is plain that the contract which was afterwards entered into between the parties to the original deed shows clearly the character of the original deed, and is sufficient of itself to show that the original deed was intended as a mortgage to secure Mr. Cannon the amount named therein as a consideration for the deed. When the contract of February 3, 1906, set out above in full, was entered into, the parties no doubt made a settlement of their affairs up to that time, and it was then found that there was a balance of $17,200 due from Mr. McGinley to Mr. Cannon.

Even though this agreement was made some two years and a half after the original deed was made, we have no doubt that it was made because of that deed, if it may not be said to be a part of the same transaction. This contract shows upon its face that Mr. McGinley was recognized by Mr. Cannon as a half owner of the property, subject to the payment of $17,200, because the contract provides that, in case of the death of either party, the survivor shall have the right to purchase the interest of the other for the appaised value. It also clearly shows that, upon the payment of $17,200, Mr. McGinley would be an equal owner in the property. When these two instruments are construed together, even if there were no other evidence in the case, it shows conclusively that the two instruments, taken together, were intended as a mortgage of Mr. McGinley's interest in the property to Mr. Cannon for the amount stated, at the time the contract was entered into on February 3, 1906. Outside of these two agreements, the evidence of disinterested witnesses clearly shows that these two instruments were intended by the makers thereof as a mortgage to secure the payment of the debt owing by Mr. McGinley to Mr. Cannon. The evidence of disinterested witnesses also shows without dispute that this was not the whole reason for making the deed. It was made for

the purpose of permitting Mr. Cannon to borrow money upon the property, and also for the purpose of preventing the property being incumbered by Mr. McGinley. We are satisfied that the trial court properly held this contract and the original deed from McGinley to Cannon to constitute a mortgage in favor of Mr. Cannon. It is not necessary, therefore, to enter into a discussion whether the original deed was a deed in express trust, or whether an express trust might be proved by parol. There is clearly sufficient here to show that the original deed was intended as a mortgage, and was so held and construed by both parties thereto during the lifetime of Mr. Cannon.

It is next argued by the appellants that the trial court erred in confirming the report of the referee, and in finding that the indebtedness from Mr. McGinley to the estate of Mr. Cannon, deceased, was no greater than $17,012.41 at the time of the trial. After the court had adjudged that the deed and contract constituted a mortgage, the case was referred to a referee for an accounting. The referee found that, after all credits for rent and all debits for money advanced for the building had been taken into account, there was owing by Mr. McGinley to the estate of John Cannon, deceased, the sum of $17,012.41. He also found that Mr. Cannon had placed a mortgage upon the property which was yet unsatisfied, and which amounted to $16,000; that the property was liable for this mortgage; that Mr. McGinley was entitled to credit upon his indebtedness to the estate of one-half of the mortgage; and that, upon payment of $9,012.41, he would be entitled to his one-half interest in the property.

The appellants contend that the court erred in confirming the report of the referee to the effect that the Cannon estate was liable for rent provided for in the lease to Mr. Sheehan, which was therein agreed to be $6 per room per month. There was evidence introduced to the effect that the reasonable value of the rent for these rooms was only $3 per room

per month; and it is argued that, upon Mr. Sheehan's death and upon Mr. Cannon acquiring the interest of Mr. Sheehan's estate in the lease, the lease was merged in the title, and that the Cannon estate was therefore lawfully liable for only the reasonable rent. But as we have seen above, Mr. Cannon and Mr. McGinley were joint tenants in the property. There was never any claim by Mr. Cannon in his lifetime that Mr. McGinley was not the owner of one-half interest in the property. It is true the legal title to the property stood in Mr. Cannon's name. He executed the lease to Mr. Sheehan at the stipulated price. He afterwards purchased Mr. Sheehan's interest in the lease; but he held over under that lease during the term of the lease and accounted for the rents of the building at the prices named in the lease. After his death, his executors accounted for the rents upon the same basis. It seems plain that their construction of the lease, and of Mr. Cannon's tenancy, ought to control at this time. There was no notice by Mr. Cannon to Mr. McGinley that he was not holding over under the terms of the lease after it had expired; but his conduct during his life, and that of his executors after his death, shows that they were holding under the terms of the lease, and not as a tenant in common with Mr. McGinley, but as lessee from the owning partners. In *O'Connor v. Delaney*, 53 Minn. 247, 54 N. W. 1108, 39 Am. St. 601, it was said:

"But, by agreement, one may become tenant of the other of his part of the estate; and, when the relation of landlord and tenant is thus created, we think the tenant co-owner, if he remain in exclusive possession after the terms for which his cotenant's share was let to him, will be held to do so in his character of tenant, and the same rules will apply as in case of any other tenant holding over. It was therefore correct to charge the defendant, during the time of his so holding over, at the rate of rent agreed on for the term."

See, also, *Schmidt v. Constans*, 82 Minn. 347, 85 N. W. 173, 83 Am. St. 437; *Harry v. Harry*, 127 Ind. 91, 26 N. E. 562. We are of the opinion, therefore, that the trial court

properly allowed the item of rent as provided for in the original lease. Other items are questioned by the appellants; but we find no reason why these items were not properly considered and allowed by the court. Numerous items are set forth in the accounts. From a careful examination thereof, we are unable to find any error.

The judgment is therefore affirmed.

MORRIS, C. J., ELLIS, and FULLERTON, JJ., concur.

[No. 12471. *En Banc.* March 18, 1916.]

THE CITY OF VANCOUVER, *Respondent*, v. CORPORATION OF THE CATHOLIC BISHOP OF NISQUALLY, *Appellant*.[1]

MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENTS—BENEFITS—REVIEW BY COURTS. The confirmation of an assessment by eminent domain commissioners will not be disturbed on appeal for mere difference of opinion as to the amount of the benefits conferred, nor unless the record discloses that the commissioners acted arbitrarily or upon a fundamentally wrong basis.

SAME—ASSESSMENTS—BENEFITS—EVIDENCE. The fact that an improvement extending a street changes a lot from a lot in the center of a two-block area to a corner lot suggests a sufficient reason for assessing benefits at $312.50, while an opposite corner lot not so changed was assessed at only $103.

SAME—ASSESSMENTS—BENEFITS—USE OF PROPERTY. The fact that property assessed for benefits was used as church property is not material in determining the question of benefits conferred by the improvement.

HOLCOMB, CHADWICK, and FULLERTON, JJ., dissent.

Appeal from an order of the superior court for Clarke county, Back, J., entered May 18, 1914, confirming an assessment roll for a public improvement, after a hearing before the court. Affirmed.

[1]Reported in 156 Pac. 383.

M. M. Connor and *Geo. O. Davis*, for appellant.

Geo. B. Simpson, for respondent.

MORRIS, C. J.—This is one of those cases, oft before the courts, wherein the property owner is seeking relief from an assessment made by a board of eminent domain commissioners in local improvement districts, upon the contention that such assessment is in excess of benefits, arbitrary and inequitable. The appeal is taken from the order confirming the assessment roll. As is usual in these cases, there is a difference of opinion as to the amount of benefit conferred by the local improvement, but courts will not concern themselves with differences of opinion as to the actual benefit. The final decision of such questions must rest somewhere, and it is the settled policy of the courts to rest it with that body upon which the law has conferred the determination, save in those cases where the record discloses that such body has acted arbitrarily or upon a fundamentally wrong basis. *Viegle v. Spokane*, 78 Wash. 359, 139 Pac. 33; *In re Boyer Avenue*, 79 Wash. 664, 141 Pac. 58.

Appellant's property, of an approximate area of two city blocks, was used for church purposes, and the improvement consisted of extending a street north and south through its center. The assessment was levied upon the appellant's property and upon the blocks to the north and south. An illustration from the record will indicate the basis upon which appellant supports its contention that the assessment upon its property was arbitrary and fundamentally wrong. One of appellant's lots cornering on the extended street was assessed at $312.50, while the lot opposite appellant's lot and somewhat larger was assessed at only $103. Looking at the plat, a reason suggests itself for this difference which may or may not have been the one moving the commissioners to fix the assessment at these sums. The lot opposite, on the northeast corner of Columbia and Thirteenth streets,

was benefited only to the extent of extending Columbia street south through appellant's property; it already was a corner lot having north, east and west approaches. Its frontage was in no manner changed or interfered with. It was given only an additional approach from the south, while appellant's lot, prior to the improvement, had a street frontage of sixty-six feet on Thirteenth street, and was located in the center of the block facing Columbia street to the north. By extending Columbia street to the south, it was made a corner lot, its north frontage being reduced to thirty-three feet, and it was given an added west frontage of one hundred feet. We assume it has received full compensation for the thirty-three feet taken, and the only question before the commissioners was the benefit to the remainder. This change from a lot in the center of a two-block area to a corner lot with a frontage of one hundred feet on the street extension was a factor to take into consideration in determining the benefit.

Had the entire assessment been levied upon appellant's property, then the case would be similar to *In re Eighth Avenue Northwest*, 77 Wash. 570, 138 Pac. 10, but such is not the fact. Neither does it appear that the commissioners charged back against the remainder of appellant's property the amount of the condemnation award made for the property taken and then assessed the remainder for the full benefits in addition, as was done in *In re Ninth Avenue West*, 76 Wash. 401, 136 Pac. 488. The assessment was distributed over appellant's property and upon the blocks to the north and south, and we can gather from the record nothing, save that there was a sharp difference of opinion as to the extent of the benefit. It must be borne in mind that it is not the amount of the assessment that should influence either the lower court or this court in disturbing it. The test is the benefit conferred. In determining the extent of the benefit to a given property by a municipal im-

provement, it is not unusual to find wide difference of opinion; but mere difference of opinion between witnesses as to the amount of benefits conferred does not of itself establish such a case as calls for the interference of the court. It must, in addition, be shown that the rule by which the benefits were measured was fundamentally wrong and so arbitrary and unjust, as affecting the property owner, as to evidence "fraud, mistake (of fact or law, but not matters of opinion), or arbitrary action amounting to a manifest abuse of discretion." *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279; *In re Fifth Avenue etc.*, 66 Wash. 327, 119 Pac. 852.

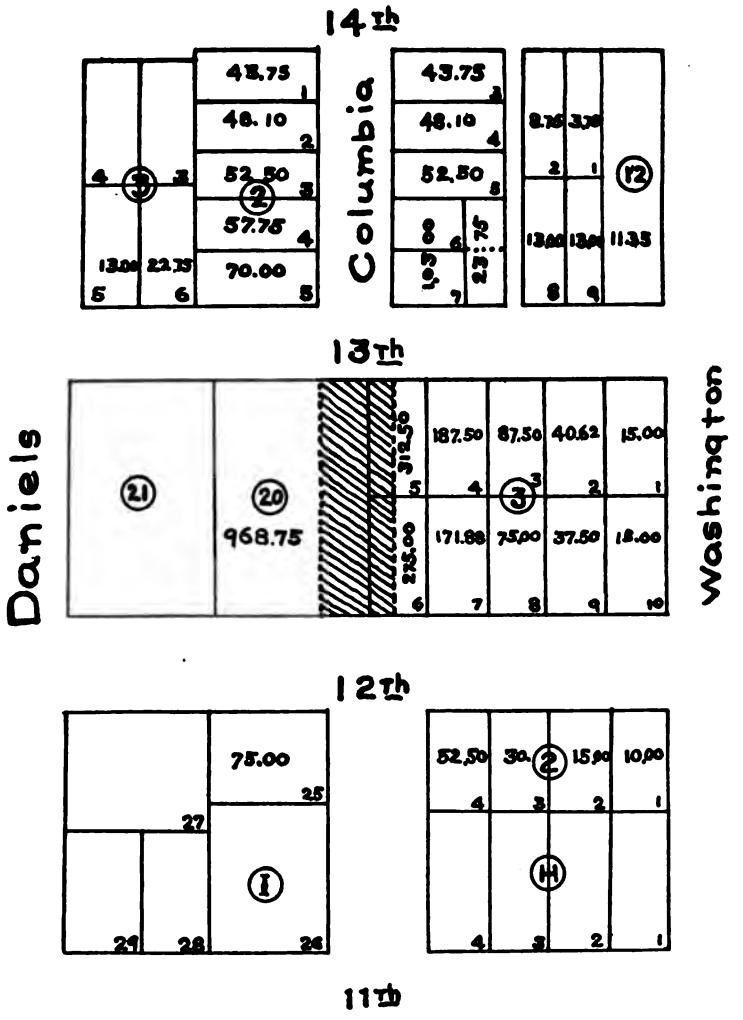
The main objection here seems to be that the property of appellant is used for church purposes, and that the improvement is not beneficial for such purposes to the extent of the assessment. The use to which the property is put cannot of itself determine the question of benefits, but the usual test is the increase of value for any use to which the land might be adapted. *Northern Pac. R. Co. v. Seattle*, 46 Wash. 674, 91 Pac. 244, 123 Am. St. 955, 12 L. R. A. (N. S.) 121; *Newell v. Loeb*, 77 Wash. 182, 137 Pac. 811. In the first of these cases, it was said:

"The particular use of the land cannot affect its liability to assessment; abutting property cannot be relieved from the burden of a street assessment simply because its owner has seen fit to devote it to a use which may not be specially benefited by the local improvement. The benefit is presumed to inure, not to such present use, but to the property itself, affecting its value."

The record in this case does not show any fact which should lead us to disturb the judgment, and it is affirmed.

MOUNT, MAIN, PARKER, and ELLIS, JJ., concur.

CHADWICK, J. (dissenting)—This is an eminent domain proceeding. I have prepared a plat to illustrate my argument.



If it is apparent from the record that the eminent domain commission has not made a fair assessment, we have always set aside the assessment roll. The test usually employed is to compare the assessment upon the property of the protesting owners with the assessment put upon the property relatively situated. The appellant is the owner of prop-

erty equal in extent to two blocks, bounded by Thirteenth and Twelfth streets on the north and south, and Washington and Daniels streets on the east and west. Columbia street, which runs north and south between Washington and Daniels street, was unopened through the property of the appellant. The city brought a proceeding to condemn a strip of land sixty feet wide and conforming to the boundaries of Columbia street if it extended through the property. There were two or three assessment rolls made up, but we shall deal only with the one now before us. The last roll assessed the property of appellant from one hundred to one hundred and fifty per cent higher than did the first roll. The disposition of the board of eminent domain to assess back upon the property of appellant as much as it thought it could is not concealed. One member of the board testifies that it was the intention of the board to *raise a sufficient amount of money irrespective of benefits. Another member testified that it was his intention to assess a good share of the amount necessary to be raised to pay the judgment entered in the eminent domain proceedings upon the property of appellant, and regardless of any increased value.* In answer to the direct question: *"Then your idea was to assess the entire proposition on the church property?"* he said: *"Yes, that was my idea."*

Disregarding the opinion of many witnesses who testified that the benefit to appellant's property was very much less in all instances (more than one hundred per cent less) than the amount fixed in the assessment roll, and taking the testimony of the commission, and the assessment roll itself, the case falls squarely within several of our own former decisions. The roll shows upon its face a disposition to cancel arbitrarily as much of the judgment entered in favor of appellant for the taking of its property as the conscience of the board would permit. Taking the same basis of comparison that we have heretofore employed in similar cases, we find that a lot 33x100 owned by appellant is assessed at

$312.50, while diagonally across Thirteenth street a lot 42.61x101.25 is assessed at $70. A lot owned by appellant, 33x100, on the corner of Twelfth and Columbia streets as extended, is assessed at $275. A lot diagonally across, 100x75 feet, is assessed at $75.

The opinion of the majority but skims the surface of the case. They take into consideration only the one lot at the northeast corner of Thirteenth and Columbia streets and the lot opposite. Appellant's lot is fractional and assessed at $312, while the whole lot directly opposite is assessed at $103. The majority says that the plat suggests a reason for the difference, and argues that, because the lot of appellant is left as a corner lot, it is not injured but is benefited. The utter fallacy of this reasoning is apparent when it is understood, and the record shows, that the object of cutting through the property of appellant, which was devoted to a particular use, was *to give the people living north of this property a direct roadway into the business center of the city of Vancouver.*

But the case cannot be decided by taking one lot alone and comparing it with another and there closing the inquiry. The majority assume that there may be a greater benefit in a corner lot, although it is well known that this is not so unless the property is to be business property.

Accepting the theory of the majority and carrying it to other lots similarly situated, that is, inside lots, we have one of the lots of appellant in block three assessed at $171.88, and one directly opposite at $52.50; another at $75, and the one opposite at $30; another at $37.50, and one opposite at $15. The lots on Thirteenth street and those opposite are relatively disproportionate. The fractional half block, or tract twenty, being 83x200 feet, belonging to appellant, is assessed at $968.75. A full half block to the north, to which the improvement is immediately beneficial, is assessed at $272.10. It seems to me that the plat needs no further discussion. It speaks for itself.

While it is true we have consistently held to the doctrine that we will not hold an assessment to be arbitrary or unjust where there is a mere difference of opinion, we have also laid down the rule that an unjust or arbitrary assessment will not be allowed to go unchallenged, and further, that a manifest disposition on the part of an eminent domain commission to make the remainder of a claimant's property pay the cost of that which is taken will be held to be an arbitrary exercise of power on the part of the city. It is not a question of benefit alone. It may be that a particular piece of property is benefited to the extent of the whole improvement, but in eminent domain cases the real question is one of relative benefit, and whether the assessment has been "distributed with substantial equality over all property of like kind and similarly situated with reference to the subject-matter of the assessment." *In re Eighth Avenue Northwest*, 77 Wash. 570, 138 Pac. 10. See, also, *In re Ninth Avenue West*, 76 Wash. 401, 136 Pac. 488.

Upon a similar state of facts, the court said, in *In re Fifth Avenue West*, 80 Wash. 464, 141 Pac. 1035:

"The courts will not concern themselves with mere differences of opinion as to the actual benefits conferred, but it must appear from the proceedings as a whole that the authority levying the assessment has acted arbitrarily in disregard of the actual benefits, or has proceeded upon a fundamentally wrong basis. We have no hesitancy, however, in saying that the record shows arbitrary action on the part of the eminent domain commissioners in the present instance. The very fact that they found so large a part of the benefits to have been conferred upon the property of the persons who received the award for the property taken is alone sufficient to excite inquiry as to their good faith. It raises the suspicion that they thought the jury's award excessive, and sought to correct it. But the amount of the award made by the jury was of no concern of the eminent domain commissioners. If the award was in excess of the actual value of the property taken and damaged, it should have been corrected in the condemnation proceeding itself by some of the

methods provided by law for the correction of excessive verdicts. When the award has been allowed to become final in its effect it must be accepted as a verity, and the subsequent proceedings must be governed by the principle that it is final and not subject to further inquiry or correction. But whatever may have been the theory on which the eminent domain commissioners acted, we think the evidence clearly demonstrates that the appellants' property has not only been assessed more than its proportionate share of the cost of the improvement, but grossly in excess of the benefits conferred upon it by the improvement."

So, also, in *Spokane v. Kraft*, 82 Wash. 238, 144 Pac. 286, we said:

"In some of our cases where there was no question of relative benefit, the court has said that a property owner could not complain of the amount of the assessment, provided it did not exceed the benefits. In those cases the questions of relative value seem not to have been raised. It has never been our purpose to hold, for it is not the law, that a property owner can be compelled to give his property for a public use without compensation; or, in meeting a burden common to the public, pay more than his relative share. The question here is, not whether the particular property is benefited, but whether all property relatively benefited bears its equable and equitable proportion of the costs of the property or improvement. . . .

"But it is insisted that we have held, without qualification and steadfastly, that this court will not disturb an assessment unless it appears that it was made in fraud of the right of a property owner, or that it was arbitrary, or captious, or that the assessment was made upon a fundamentally wrong basis, and that there is no evidence in this case that this was so.

"It occurs to us that the record is pregnant with the *indicia* of an arbitrary purpose to lay a heavy hand upon appellants and to compel them, by a process of litigation and bookkeeping, to practically donate the property taken from them for street purposes.

"No better evidence could be offered than the fact that the eminent domain commissioners disregarded the relative situation and benefit to other property. . . .

"While the temptation to put the burden of payment upon the property owner in such cases may be strong, yet the law is such that the board should disregard entirely the source from whence the property comes, and treat the claimant in a condemnation suit when his day for assessment comes as it would one whose property had not been taken, and assess benefits, if any, accordingly."

Furthermore, appellant rests its case upon our holding in *In re West Bertona Street*, 81 Wash. 125, 142 Pac. 483, where the city condemned property through a tract held and used for school purposes. Forty per cent of the cost in the *West Bertona Street* case was taxed back upon the claimant's property. We there held that it would be manifestly unjust to tax more than a relative proportion of the cost of the improvement to the remaining property; that the street would be of no greater benefit to the abutting property than it would to other property which would have access to a new street which was necessary for their convenience and was not desired, nor would it add to the convenience of the school property.

Counsel for respondent does not deny that the assessments are greatly in excess of the assessment upon adjacent property. He says:

"True, the assessments placed upon the appellant were greatly in excess of the assessments placed upon adjacent property, but the adjacent property did not have any increased frontage by the improvement."

The law will not tolerate the presumption that the increased frontage will be of greater benefit to the property remaining than it is to other property. That question is merged in the former judgment. *Lincoln County v. Brock*, 37 Wash. 14, 79 Pac. 477; *Lewis v. Seattle*, 5 Wash. 741, 32 Pac. 794; *Kitsap County v. Melker*, 50 Wash. 29, 96 Pac. 695; *Hieber v. Spokane*, 73 Wash. 122, 131 Pac. 478; *Pierce County v. Thompson*, 82 Wash. 440, 144 Pac. 704.

The only ground for the increased assessment suggested

by the commissioners and the only justification for their action urged by counsel being that appellant is given an increased frontage, it would seem that the assessment cannot be sustained, under the *West Bertona Street* case, *supra*. We there held, and rightly, too, that an assessment based on benefits for an increased frontage to one whose property had been taken was laid under a fundamentally wrong basis. The eminent domain commissioners can do no more than to assess an amount sufficient to pay the judgment in the eminent domain proceeding and fairly distribute it over the improvement district. *This is not a street improvement under the assessment district statute. It is an eminent domain proceeding*, and any plan that in its operation makes one whose property is taken pay more than his share of the judgment is arbitrary and unjust; especially so, where the commissioners frankly admit a purpose which has received the condemnation of this court whenever presented, and have as frankly published their purpose in the assessment roll. They have proceeded under a misconception of the law and upon a fundamentally wrong basis.

But accepting the frontage theory, let me demonstrate that its assertion is a subterfuge. Reject lot 5, in block 3, as having new frontage. Then take of the remainder of appellant's property in block 3, lots 4, 3, 2, and 1, on Thirteenth street. These are assessed at $330.62, and the same approximate area across Thirteenth street is assessed at $61.05. Reject lot 6, and take lots 7, 8, 9 and 10. These are assessed at $299.38, while the lots across Twelfth street aggregating an area equal to four-fifths of lots 7, 8, 9, and 10, are assessed at $107.50. Can it be said that appellant's lots that do not touch the opened street are benefited more than like property belonging to other people? None of the lots mentioned have any more frontage than they had before. They have the same benefit. Their relative situation is the same, and, in the absence of some reason not apparent in the record, should be assessed for about the same

amounts. When it is understood that the street is opened to make an arterial way connecting Columbia street and for the general convenience of all property in the district, it will be readily seen that respondent has asserted a position that is not only not good in law, but is contradicted by its own figures.

Failing to distinguish between a case where an assessment is laid to cover the cost of an improvement under a local assessment statute, and an assessment made by an eminent domain commission to cover the cost of taking property in an eminent domain proceeding, the majority has gone astray. In the first class of cases, there may be differences of opinion as to benefits of which the courts will take no notice, for assuredly, so long as a person is not called upon to pay a sum in excess of benefits, he should not complain. But in the second class of cases, the first inquiry is not one of benefit, but whether the owner has received that compensation for the property taken which the constitution, art. 1, § 16, guarantees to him.

The law is that all property benefited shall bear its just proportion of the cost and that the owner shall not be deprived of his compensation by resort to subterfuge. The question of benefit is considered only as it relates to the distribution of this cost, and we had so thoroughly established the rule that the cost is to be distributed in proportion to the relative benefit, that I had believed the question to be forever foreclosed. *Spokane v. Onstine*, 86 Wash. 4, 149 Pac. 1.

If it is not so, a city, acting through an eminent domain commission that is willing to boldly assert its purpose to make the property taken bear a disproportionate part of the cost, as was done in this case, can defeat one of the first and most cherished declarations of the Bill of Rights. It can punish a property holder if he is not willing to give that which the constitution says shall not be taken without just compensation first ascertained and paid.

The plat speaks the utter disregard of appellant's rights more eloquently than words, and gives emphasis to the fact that this court is willing to sustain a city when it openly declares that it did not, and does not, intend to respect the rights of the appellant. If the argument of the majority be sound, a city is not under compulsion to make even a pretense of distributing the relative cost of taking property, but may assess the whole of it to the unwilling landowner.

The majority rests its decision upon *Viegle v. Spokane*, 78 Wash. 359, 139 Pac. 33; *In re Boyer Avenue*, 79 Wash. 664, 141 Pac. 58, and undertakes to distinguish *In re Eighth Avenue Northwest*, and *In re Ninth Avenue West*, *supra*. *Viegle v. Spokane* was a local improvement case, and the law governing this proceeding had no application. *In re Boyer Avenue* was an eminent domain case. The "difference of opinion" in that case which the court refused to arbitrate was a difference, not in the laying of the cost, but over the boundaries of the district. Upon the question of assessment, we held that the purpose being to make an arterial highway (as in this case), part of the cost should be borne by the city. In so far as the *Boyer Avenue* case touches this case, it is an authority against the holding of the majority. In *In re Ninth Avenue*, the court did not hold that the assessment was bad because the whole cost was assessed back upon the property, but specifically because all property relatively benefited should bear a just proportion of the cost. The principle is well stated in the concurring opinion written by Judge Ellis. He said:

"I am not convinced that the assessment was made upon a fundamentally wrong basis, nor that the appellants' property was not benefited to a greater extent than the property on the opposite side of the street. The disparity, however, between the two amounts seems to me so great as to indicate arbitrary action. It is difficult to see from the evidence wherein the appellants' property was benefited in more than

double the amount assessed against like property across the street."

The same holding was made in the *Eighth Avenue* case. The other cases relied upon state admitted propositions, but they have no bearing upon the questions presented by the record.

There is no question of difference of opinion in this case. Opinion implies reason. An opinion that will not reason out is no opinion. An arbitrary purpose to do that which the law says shall not be done cannot be sustained under the cloak of opinion. But, granting that there is a difference of opinion between appellant and its witnesses and the eminent domain commissioners, we may still look to the reason. When we do so, we find, as the commissioners admit, an arbitrary design to reduce appellant's award in the condemnation suit to an amount which, in their judgment, is more equitable than the sum found by the jury.

It seems to me that the majority, in holding that appellant cannot complain if it is benefited in any degree, have abandoned a most salutary rule; that is, that assessments to cover the cost of taking property must be made upon the basis of relative benefit, and if not so made, are laid upon a fundamentally wrong basis. All, or the greater proportion, of the expense of an improvement creating an arterial highway for the greater, if not the sole benefit, of others, should not, in justice and equity, be put on the property of the one whose property has been taken. When it is done, as in this case, it should not be countenanced.

For these reasons, I dissent from the opinion of the court.

FULLERTON, J., concurs with CHADWICK, J.

HOLCOMB, J. (dissenting)—I cannot escape the conviction that the assessments levied back against appellant's property and the situation existing are extremely similar to those shown in *In re West Bertona Street*, 81 Wash. 125, 142 Pac. 483. Upon the reasoning in that case, this case should follow the same course. I therefore dissent.

[No. 12781. Department One. March 24, 1916.]

NELLIE G. MILLER, *Respondent*, v. FRANK S. MILLER, *Appellant*.[1]

JUDGMENT—FOREIGN JUDGMENT—WARRANT OF ATTORNEY TO CONFESS—FULL FAITH AND CREDIT. A judgment upon a note entered upon a warrant of attorney, contained in the note, to confess judgment without personal service, is a judgment within the meaning of the clause of U. S. Const. and the act of Congress requiring full faith and credit in each state to judicial proceedings of every other state; and when rendered in the state where the debtor resided when the warrant was executed in strict conformity to the power, and recognized in such state as a valid judgment, will be given effect in this state although our laws do not authorize the practice of entering judgment by confession on a warrant of attorney.

SAME—FOREIGN JUDGMENTS—PROOF—PERSONAL SERVICE—STATUTES. Rem. & Bal. Code, § 1255, providing that a judgment for debt rendered in any other state against a resident of this state shall not be of any higher character as evidence of indebtedness than the original claim or demand, unless rendered upon personal service of summons, notice, or other due process, is merely intended to make a distinction between judgments *in personam* and *in rem;* and does not militate against the giving of full faith and credit to a judgment of a sister state rendered upon a warrant of attorney to confess judgment, as the same is a judgment *in personam*.

EVIDENCE—JUDICIAL NOTICE — FOREIGN JUDGMENTS — ACTIONS. In determining whether the court of a sister state had jurisdiction to render a judgment sued on, judicial notice will be taken of the laws of such state; and it is therefore unnecessary to plead or prove that the court was a court of record.

LIMITATION OF ACTIONS—TOLLING STATUTE—PAYMENT ON NOTE—EVIDENCE—SUFFICIENCY. A finding that a payment was made on a note at the date shown by the indorsement, so as to toll the statute of limitations, is sustained by the evidence, although contradicted by the maker, where the maker had only his memory to rely on after the lapse of years, and there was nothing to show that the indorsement, which was a declaration against interest, was not made at the time it is purported to be made.

SAME—TOLLING STATUTE—ADVANCE PAYMENT OF INTEREST. Where the statute of limitations against a note is tolled by a payment of

[1]Reported in 156 Pac. 8.

interest in advance, the limitation commences to run from the time to which interest is paid.

EVIDENCE—JUDICIAL NOTICE—FOREIGN JUDGMENTS—ACTIONS. In order to give full faith and credit to a judgment of a sister state, the court may take judicial notice of all the statutes of the state which must have been taken into consideration in entering the judgment, including the statute of limitations.

LIMITATION OF ACTIONS—TOLLING STATUTE—ABSENCE FROM STATE—ACTION ON JUDGMENT—PRESUMPTION. Where the record in an action upon a judgment of a sister state shows that the debtor removed from such state at some undisclosed date between the time of the accrual of the cause and the commencement of the action, it cannot be presumed that the action was barred by lapse of time, in view of Rem. & Bal. Code, § 168, suspending the statute of limitations during the absence of the debtor from the state.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered September 12, 1914, upon findings in favor of the plaintiff, in an action to recover upon a foreign judgment, tried to the court. Affirmed.

Lund & Lund, for appellant.

Knight & Muscek, for respondent.

FULLERTON, J.—This is an action brought by the respondent against the appellant to recover upon a judgment of the municipal court of Chicago, state of Illinois, entered in favor of the appellant against the respondent in that court on February 17, 1913. The respondent recovered in the court below, and this appeal is prosecuted from the judgment evidencing the recovery.

On August 22, 1898, the appellant executed and delivered to one Fredereka A. Miller, a note containing a warrant of attorney to confess judgment, of which the following is a copy:

"400.00 Sterling, Ill., Aug. 22, 1898.

"Four years after date, for value received, I promise to pay to Fredereka A. Miller, or order, four hundred dollars ....at.....with six per cent interest from date, till paid, payable annually. And it is expressly agreed that if

default be made in the payment of the interest when due, the entire principal shall become due and payable and the holder of this note may proceed at his option to collect the same. And we hereby appoint any attorney of any court of record in any state or territory of the United States, to appear for us in any court in term time or vacation, at any time after date and waive the issue and service of process and confess a judgment against us in favor of the then holder hereof, for the amount of the above note, also interest then due, and costs including twenty-five dollars attorney fee, and to file a *cognovit* for that amount, and an agreement releasing errors and waiving all appeal in said cause, and all advantage which we may be entitled by virtue of any and all exemption laws of the state, and any state or territory where judgment may be entered by virtue hereof, and that no bill in equity shall be filed to interfere with the operation of said judgment. All signers to this note are principals. No extension of the time of payment, with or without our knowledge, by receipt of interest or otherwise, shall release us, or either of us, from the obligations of payment.

"Witness our hands and seals the day and year above written. Frank S. Miller (Seal)."

On February 14, 1913, the respondent instituted an action in the municipal court of Chicago to recover upon the note. In her statement of claim she alleged that the instrument had been assigned to her in writing by Fredereka A. Miller on July 28, 1903, and that there was due thereon the sum of three hundred dollars, with interest from August 22, 1903, for which sum, together with the sum of $25 as attorney's fees, she demanded judgment. Attached to the statement was the original note, which showed indorsements on the principal sum amounting to $100, and indorsements of payments of interest down to August 22, 1903. Accompanying the statement was a *cognovit* signed by one Henry Pollenz, who purported to act as the appellant's attorney, in which he confessed that the appellant owed to the respondent the amount demanded in her statement, "and that said plaintiff [respondent] has sustained damages on occasion of the nonperformance of the agreement in said state-

ment mentioned to the amount of five hundred and twenty-three dollars ($523) over and above costs and attorney's fees in this behalf expended; and said defendant [appellant] agrees that judgment may be entered against him for said sum of money, and in addition thereto for twenty-five dollars ($25) to be allowed to the plaintiff for attorney's fees . . ." Thereafter, and on February 17, 1913, the judge of the municipal court directed judgment to be entered for the amount confessed to be due, and granted to the plaintiff leave to withdraw the original note upon filing a certified copy thereof. Judgment was accordingly entered on the same day.

The complaint in the present action was based upon the record of the Illinois court. It was alleged that the municipal court of Chicago is a court of record, that it is accorded general jurisdiction by the statute and laws of the state of Illinois, and that the judgment sued upon was duly rendered and entered of record in such court. The appellant, in his answer, denied these allegations, and pleaded affirmatively that he had been a resident of this state for the past four years; that no service of process was had upon him in the action brought in the Illinois court; that no person was authorized by him, other than by the warrant of attorney contained in the note, to appear for him in that action; that more than ten years had elapsed on February 17, 1913, since an action accrued on the note on which the judgment against him was founded; and that he had made no payments thereon for ten years prior to February 17, 1913, the date on which the purported judgment in the Illinois court was entered against him. Neither party pleaded any statute or laws of the state of Illinois authorizing judgments to be entered by the courts therein in the manner and form in which this judgment was entered. There was no contention, however, that the original agreement was not executed by the appellant, or that he had ever revoked, or attempted to revoke, the authority given therein to enter such a judgment.

On the trial had in the court below, no evidence was offered by the respondent to substantiate the allegations concerning the jurisdiction of the municipal court, the respondent contenting herself with the introduction alone of a duly certified transcript of the proceedings therein. The appellant was permitted, over the objection of the respondent, to introduce evidence on the allegations of his affirmative answer, and the court found in his favor on all of them except the allegations with respect to the payments on the agreement; finding in that regard that the interest had been paid thereon down to August 22, 1903, a period less than ten years prior to the entry of the judgment in the Illinois court.

If we have correctly gathered the first contention made by the appellant, it is that judgments entered upon a warrant of attorney to confess judgment contained in the instrument evidencing the obligation, without personal service on the obligor, are not judgments within the meaning of the constitution of the United States, which requires that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, or judgments within the meaning of the act of Congress, passed in pursuance thereof, which provides a mode for authenticating such records and judicial proceedings and which declares that, when so authenticated, they shall have such full faith and credit given them in every court within the United States as they have by law or usage in the courts of the state from whence they are taken. But the authorities, in so far as they have been called to our attention, are against this position. That such judgments are judgments *in personam* and, when regularly entered, have the same effect as any other judgment *in personam*, has been repeatedly held by the highest court of the state of Illinois. *Osgood v. Blackmore*, 59 Ill. 261; *Bush v. Hanson*, 70 Ill. 480; *Frye v. Jones*, 78 Ill. 627; *Keith v. Kellogg*, 97 Ill. 147; *Whitney v. Bohlen*, 157 Ill. 571, 42 N. E. 162.

Owing to the somewhat drastic nature of the proceedings and the possibility of its abuse, the courts have construed the power granted by the debtor with strictness, and have held even slight departures from the granted power sufficient to avoid the judgment (*Grover & Baker Sewing Machine Co. v. Radcliffe*, 137 U. S. 287; *National Exchange Bank of Tiffin v. Wiley*, 195 U. S. 257) yet when the judgment is rendered in strict conformity with the power, and in the state where the debtor resided when the warrant was executed, and is recognized in the state where rendered as a valid judgment, the judgment is uniformly recognized as valid in the sister states, and given effect by their courts. Some of the cases so holding are the following: *Teel v. Yost*, 128 N. Y. 387, 28 N. E. 353, 13 L. R. A. 796; *Cuykendall v. Doe*, 129 Iowa 453, 105 N. W. 698, 113 Am. St. 472, 3 L. R. A. (N. S.) 449; *Richards v. Barlow*, 140 Mass. 218, 6 N. E. 68; *Van Norman v. Gordon*, 172 Mass. 576, 53 N. E. 267, 70 Am. St. 304, 44 L. R. A. 840; *First Nat. Bank of Athens v. Garland*, 109 Mich. 515, 67 N. W. 559, 63 Am. St. 597, 33 L. R. A. 83; *Nicholas v. Farwell*, 24 Neb. 180, 38 N. W. 820; *Crim v. Crim*, 162 Mo. 544, 63 S. W. 489, 85 Am. St. 521, 54 L. R. A. 502; *Coleman v. Waters*, 13 W. Va. 278; *Sipes v. Whitney*, 30 Ohio St. 69.

The same rule obtains even though the laws of the state where the judgment is sought to be given effect do not recognize or authorize the practice of entering judgment by confession on a warrant of attorney. *Cuykendall v. Doe*, 129 Iowa 453, 105 N. W. 698, 113 Am. St. 472, 3 L. R. A. (N. S.) 449. In so far, therefore, as the general nature of the judgment is concerned, it is one to which the courts of this state must give full faith and credit.

The appellant, however, assigns a number of reasons for holding the particular judgment invalid not inherent in its general nature. In support of his first assignment, he calls attention to Rem. & Bal. Code, § 1255 (P. C. 81 § 1869), which provides that a judgment for debt, rendered in any

other state or any territory against any person resident of this state at the time of the rendition of such judgment, shall not be of any higher character as evidence of indebtedness than the original claim or demand upon which such judgment is rendered, unless such judgment shall be rendered upon personal service of summons, notice, or other due process against the defendant therein, and argues therefrom that, since this judgment was not rendered upon personal service of process, the claim or demand was not proven by the mere production and introduction in evidence of a certified copy of the judgment roll. If the statute be read literally, it unquestionably supports this contention. The judgment was plainly not rendered upon the service of process of any kind, but was rendered upon a warrant of attorney authorizing a third person to appear and confess such a judgment. But we cannot think the statute should be construed thus literally. Aside from the fact that to so construe it would render it inimicable to the full faith and credit clause of the constitution of the United States, before cited, we think that such was not its intention or meaning. It was intended, in our opinion, to make a distinction between judgments *in personam* and judgments *in rem;* that is, a judgment rendered after an appearance by the defendant or after actual service upon him, and judgments rendered after some form of substituted service. No one will deny that a judgment rendered by a court of this state on an appearance of the defendant, either personally or by a duly authorized attorney, is a judgment *in personam*, regardless of whether any service of process was made or not, and the statute can hardly have been intended to make a distinction in that respect between a local judgment and a judgment of a sister state. If the judgment sued upon has any validity at all it has the validity of a judgment *in personam*. It is not a judgment on a substituted service, but a judgment rendered after an appearance by the defendant through an authorized attorney. Being, therefore, a judgment *in per-*

sonam, we are constrained to hold it not within the bar of this section of the statute.

A second reason given for holding the judgment insufficient is that there was no proof that the court in which the judgment was rendered, the municipal court of Chicago, was a court of record; a question which was made an issue by the allegations of the complaint and the denials of the answer. But we have held in cases where similar questions arose that, in determining whether the court rendering the judgment sued upon had jurisdiction to render such a judgment, we will take judicial notice of the laws of the state from whence the judgment comes. *Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 125, 83 Am. St. 806, 54 L. R. A. 204; *Dormitzer v. German Sav. & Loan Soc.*, 23 Wash. 132, 62 Pac. 862; *Clark v. Eltinge*, 38 Wash. 376, 80 Pac. 556, 107 Am. St. 858. The rule has its foundation in the full faith and credit clauses of the constitution and laws of the United States before mentioned. Since, however, the decisions cited give the reasons for the rule and refer to the cases supporting it, neither the argument nor the citations need be repeated here.

Giving effect to the rule, we find that the general assembly of the state of Illinois, in the act creating the municipal court, have declared it to be a court of record, and to have general jurisdiction over causes such as that on which the judgment in question was rendered. Hurd's Revised Statutes of Illinois for 1909, p. 702; *Gorra v. Sobra*, 151 Ill. App. 288. It follows, of course, that if the court must judicially notice the laws creating the court from which the record comes, and the laws governing the extent of its jurisdiction, it is unnecessary to either plead or prove these laws.

It is next contended that an action upon the agreement was barred by the statute of limitations of the state of Illinois at the time of the entry of the judgment thereon, and, in consequence, any authority vested by the terms of the agree-

ment in the attorney to confess judgment was likewise barred by such statutes. Two reasons are urged in support of this contention, first, that the court was in error in finding from the evidence that interest had been paid on the agreement down to a time within ten years from the date of the entry of the judgment thereon; and second, that since the statute of limitations of the state of Illinois was not pleaded nor proven at the trial below, the court must presume that the statute of that state is the same as the statute of this state, and so presuming, the right of action was barred on the obligation after six years from the date of the last interest payment.

The contention, it will be noticed, assumes that the warrant of attorney to confess judgment contained in the instrument becomes invalid unless exercised prior to the running of the statute of limitations, and that the question can be raised collaterally after the entry of a judgment on the obligation whenever any right is sought to be claimed under the judgment. Our attention has not been called to any statute of Illinois which prescribes such a rule, nor to any decision of the courts of that state which maintains it, and it would seem that some very substantial reasons could be urged against the principle it involves. The rule has, however, been announced in jurisdictions having statutes similar to the statute of Illinois (see *Kahn v. Lesser*, 97 Wis. 217, 72 N. W. 739), and the discussions in these cases would indicate that such is the rule generally prevailing. But the inquiry is one we have found it unnecessary to pursue, as we think the reasons unsound from a more narrow aspect.

On the first of the reasons urged, we are constrained to hold with the finding of the trial court. To contradict the evidence afforded by the indorsement on the agreement, the appellant has only his memory of the transaction, with no special or particular circumstances occurring at the time the payment was made which tends specially to fix the event in his mind, and after the lapse of years it is more than pos-

sible he could be mistaken. More than this, there is nothing to show that the indorsement was not actually made at the time it is purported to have been made. It was thus a declaration against interest, made in writing by the then holder of the instrument, and has the weight of positive evidence. It is not, therefore, to be overcome other than by evidence of equal cogency, and we cannot conclude that the appellant's memory of the transaction is such evidence.

In this connection, the appellant further contends that the indorsement shows an advance payment of interest—that is to say, a payment of interest on August 22, 1902, for the year following, not a payment on August 23, 1903, of interest to that date—and that the limitation commences to run from the time of the payment and not from the time to which the interest is paid. There are decisions which maintain this principle. But these we shall not review, as our own cases, which we think follow the weight of authority, are to the contrary. In *Bank of British Columbia v. Jeffs*, 15 Wash. 230, 46 Pac. 247, we held that, where a creditor, without inadvertence or mistake, receives a payment of interest in advance on a note of a debtor, and does not expressly reserve the right to sue before the expiration of the period for which interest is taken, there is a contract created to extend the time of payment during the period for which interest is paid. The rule was reaffirmed on the second appeal of the cause in *Bank of British Columbia v. Jeffs*, 18 Wash. 135, 51 Pac. 348, 63 Am. St. 875, where cases from other jurisdictions were cited which maintain the principle. If the acceptance of interest in advance on an overdue obligation creates a new contract and estops the holder of the obligation from maintaining an action thereon until the expiration of the period for which the interest is paid, it must follow that the statutory limitation against an action on the obligation begins to run from such period.

As to the second reason, it would seem that if, in order to give full faith and credit to a judgment of a sister state, we

are required to notice judicially the statutes of that state defining the extent of the jurisdiction and authority of the court entering the judgment, we can notice all of the statutes of the state which must have been taken into consideration in entering the judgment, even though one of such statutes be the statute of limitations. Doing so in this instance, we find that the statute of limitations of the state of Illinois permits actions to be commenced on instruments of this character within ten years after the last payment is made thereon. Hurd's Revised Statutes of Illinois for 1911, p. 1494. But it is unnecessary in this case to rely upon this principle. The same result would follow were we to conclude that we could not judicially notice the statutes of limitations of Illinois and must presume that they are the same as our own. Under our statute (Rem. & Bal. Code, § 168; P. C. 81 § 81), the running of the statute of limitations is suspended during the absence of the debtor from the state. We know by the record before us that the appellant removed from the state of Illinois and took up his residence elsewhere at some period between the time the last payment was made on the instrument sued upon and the time judgment was entered thereon. When the removal was made is a question on which the record is silent. Clearly, in such a case, we can indulge in no presumption of fact the effect of which would be to overturn a judgment of a sister state to which we are admonished by the paramount law of the land to give full faith and credit.

The judgment is affirmed.

MORRIS, C. J., MOUNT, CHADWICK, and ELLIS, JJ., concur.

[No. 12969. Department One. March 24, 1916.]

PERINE MACHINERY COMPANY, *Appellant*, v. ROBERT BUCK *et al.*, *Respondents*.[1]

APPEAL—RECORD—EXCEPTIONS TO INSTRUCTIONS. Timely exceptions to instructions, allowed by the court, certified by the clerk as part of the transcript, need not be embodied in the statement of facts.

SALES—SALE OF MACHINERY—IMPLIED WARRANTY—SALE BY SAMPLE. Upon the purchase of a specified kind of impeller for use on a second-hand pump, upon the statement of plaintiff, a dealer, that he could not repair the old impeller and that defendant ought to buy a new one, there is no implied warranty that the new impeller will make the old pump work satisfactorily; as the sale was by sample, with implied warranty only that it was of the kind ordered.

SAME—SALE OF MACHINERY—ACTION FOR PRICE—OFFSETS. In such a case, where no defects in the impeller were shown and the buyer did not offer to return it when it failed to work satisfactorily, and made no objection to bills rendered, he cannot, in an action for the price, offset expenses on other parts of the pump in attempting to make it work or for loss of profits on a contract while attempting to use it.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered December 23, 1914, upon the verdict of a jury rendered in favor of the defendants, in an action on contract, tried to the court. Reversed.

Shorett, McLaren & Shorett, for appellant.

Benton Embree, for respondents.

MOUNT, J.—This action was brought to recover $247.68, alleged to be the reasonable value of merchandise and services furnished to the defendants at their request. The answer of the defendants admitted that merchandise of the value of $132 was furnished, but denied that there was any debt owing to the plaintiff. As an affirmative defense and counterclaim, the defendants alleged, in substance, that one of the items furnished was an impeller for a Kingsford pump; that, at

[1]Reported in 156 Pac. 20.

the time this impeller was ordered, the defendants were engaged upon a contract with the city of Seattle to do certain sluicing work which required the use of a pump; that the plaintiff knew these facts and was familiar with the mechanism of the pump then owned and being used by the defendants, and that the defendants were not familiar with such pumps; that the pump became out of repair and failed to work; that the plaintiff advised the defendants that it would be necessary to purchase a new impeller for the pump; that the defendants, relying upon that advice, ordered from the plaintiff a new impeller; that when the impeller was delivered and placed in the pump, it failed to work satisfactorily; that defendants, in endeavoring to make the impeller work properly, expended $259.75 thereon, and still the impeller would not perform the work which it was intended and designed to perform, and by reason of such failure, the defendants sustained loss of profits amounting to $451.75; and prayed for damages in the amount of $319.75. This affirmative matter was denied by the plaintiff.

Upon these issues, a trial was had to the court and a jury, resulting in a verdict in favor of the defendants for $126.75, the difference between $133, admitted to be owing to the plaintiff, and $259.75, claimed to have been expended in an endeavor by the defendants to make the new impeller work satisfactorily. Upon the plaintiff's motion for a new trial, the court required a reduction from the verdict of $92, the price of the impeller, and entered a judgment for $34.75 in favor of the defendants. The plaintiff has appealed.

The principal errors assigned relate to the instructions of the court. The respondents move to strike the exceptions to the instructions because these exceptions are not embodied in the statement of facts. The record shows that the exceptions were taken in time, and allowed by order of the court. These exceptions and the order are a part of the transcript, and are certified therein by the clerk. This is sufficient un-

der Rem. & Bal. Code, § 395 (P. C. 81 § 697). The motion is therefore denied.

The undisputed facts are, in substance, as follows: In January, 1914, the defendants had a contract with the city of Seattle for grading certain streets. This grading work was being done by sluicing the earth. A pump, known as a Kingsford pump, was then owned by the defendants, and was being used for pumping water for sluicing. This pump was purchased by the defendants, second-hand, from a third party who had originally purchased the pump from the plaintiff. This third party had used the pump for about a year, and sold it to the defendants.

In the progress of the work, the impeller was worn and badly damaged by a stone or some substance which had gone through the pump. The impeller was taken out of the pump and taken to the plaintiff, a dealer in Kingsford pumps, and it was requested to repair the impeller. Upon an examination of the impeller, the plaintiff said that it could repair it so that it could be used for a time, but that it would not work well, and that the defendants ought to procure a new impeller. The defendants thereupon directed the plaintiff to order a new impeller from the factory. The plaintiff did not carry extra impellers in stock, and it was directed to hurry up the order. The plaintiff thereupon wired to the factory for a new impeller, and directed that the same be shipped by express. The impeller was sent by the factory to the plaintiff, and it thereupon installed the new impeller in the pump. The price of the impeller was $92. The expressage was $22.68.

After the impeller had been placed in the pump, the defendants notified the plaintiff that the impeller did not work satisfactorily. The plaintiff thereupon advised that there must be something the matter with some of the pipes. The plaintiff made no effort to fix the impeller. Thereupon the defendants endeavored to remedy the pump, and it was used for a period of two months. Thereafter the plaintiff sent a

statement of its account to the defendants, who promised to pay the same, but never did. After several unsuccessful attempts to collect the account, this action was brought.

The principal contention of the defendants at the trial was that there was an implied warranty that this impeller would work satisfactorily in this second-hand pump. It is not claimed that there was any express warranty. But the defendants insisted in the court below, and insist here, that there was an implied warranty that the impeller ordered as above stated would make the pump work satisfactorily to the defendants.

At the close of the evidence, the plaintiff requested the court to give an instruction, in substance, that the jury should return a verdict in favor of the plaintiff for the full amount claimed. We think this instruction should have been given. It is plain, under the facts, that if there had been an express warranty, damages on account of lost profits in a contract of this kind could not be recovered. *Puget Sound Iron & Steel Works v. Clemmons*, 32 Wash. 36, 72 Pac. 465. We think it is equally plain that there could be no implied warranty that the new impeller would make the old pump work satisfactorily, upon the admitted facts. The rule is:

"On a sale of machinery there is in general an implied warranty that the machine is reasonably adapted to the purpose for which it is purchased. No such warranty is implied, however, on the sale of a second-hand machine. There is, moreover, no warranty that a machine designed for a general use is suitable for a particular purpose or use, or that a known and designated machine purchased by name will serve a specific purpose, especially where the machine is made according to the plans and specifications of the buyer. So too there is no implied warranty that a machine is as suitable for the purpose as other machines of the same class." 35 Cyc. 408.

The rule is also stated in 35 Cyc. 405, as follows:

"On a sale by sample there is an implied warranty that the bulk of the goods is equal to the sample in kind and

quality. Where the sale is by the manufacturer of the goods there is an implied warranty that the goods sold are free from latent defects not discoverable by ordinary examination; but the rule is otherwise where the sale is by a dealer who is not the manufacturer of the goods. There is no warranty of fitness for the purpose intended, nor ordinarily that the goods are merchantable, although the facts and circumstances of the case may justify the inference that this condition is superadded to the contract. The warranty implied is not strictly speaking a warranty of quality, but merely that the seller shall deliver goods of the quality of the sample."

This court in *Hurley-Mason Co. v. Stebbins, Walker & Spinning*, 79 Wash. 366, 140 Pac. 381, L. R. A. 1915 B 1131, said:

"According to the great weight of authority, there is a distinction between executory sales by manufacturers and executory sales by dealers; the rule being that, on a sale by a manufacturer, there is an implied warranty of fitness for the purpose intended, and of freedom from defects not discoverable by ordinary inspection and tests, while on a sale by a dealer, there is no such implication, in the absence of a specific warranty to that effect. All that is required of a dealer is an exercise of good faith and fair dealing."

This is the general rule. This order was clearly an order by sample. The only implied warranty was that the impeller furnished was the one ordered. There is no contention that the impeller ordered was not an impeller for that particular make of pumps. No defect is shown in the impeller. The only difference between the old and the new impeller, as shown by the evidence, is that the new impeller had no holes in it, while the old one had four holes. The cost of drilling these holes might have been a proper offset against the price of the impeller. This cost is not shown. It was no doubt trifling. It was clearly the duty of the defendants, when they discovered that the impeller would not work as they say "satisfactorily," to return the impeller to the plaintiff with notice of that fact. There is no claim on the part of

the defendants that they have returned, or offered to return, the impeller. They simply notified the plaintiff that the impeller would not work satisfactorily. This clearly would not authorize the defendants to expend money upon other parts of the pump and offset such expenses against the plaintiff's claim. Furthermore, no objection was made to several statements of account which were rendered to the defendants by the plaintiff. They promised to pay the bill, making no objection to the price of the impeller, or that the expressage also had been charged as a part of the expense in obtaining the impeller. Under these facts, we are satisfied that the items claimed as an offset are improper, and that the trial court should have directed a verdict in favor of the plaintiff for the full amount of the claim.

The judgment is therefore reversed, and the case remanded with direction to the trial court to enter a judgment in favor of the plaintiff for the amount prayed for in the complaint.

MORRIS, C. J., CHADWICK, ELLIS, and FULLERTON, JJ., concur.

[No. 12986. Department One. March 24, 1916.]

WASHINGTON BOOM COMPANY, *Respondent*, v. CHEHALIS BOOM COMPANY, *Appellant*.[1]

TRIAL—INSTRUCTIONS—ACCEPTED FACTS. It is error to refuse a requested instruction that the jury accept specified material facts which were not disputed.

EMINENT DOMAIN—DAMAGES—PRIVATE PROPERTY OF BOOM COMPANY—INSTRUCTIONS. In an action to condemn certain property of a boom company which the supreme court on a former appeal had decided to be its private property and not devoted to any public use, it is error to refuse to instruct that the jury could not take into consideration defendant's organization as a boom company in order to enhance or affect the damages for condemning property rights which were simply private property rights not devoted to a public use.

NAVIGABLE WATERS—BEDS AND SHORES—TITLE—GRANT BY UNITED STATES—UNMEANDERED STREAMS. The state, under Const., art. 17, § 1, being the owner of the beds and shores of navigable streams, a railroad grant of designated lots across which there was an unmeandered navigable slough does not convey the title to the shores or bed of the slough, the limit of the grant being ordinary high water where there is no meander line.

Appeal from an order of the superior court for Chehalis county, Irwin, J., entered March 2, 1915, in favor of the plaintiff, upon setting aside a verdict and granting a new trial, in condemnation proceedings. Affirmed.

A. Emerson Cross and *G. R. Snider*, for appellant.

Hogan & Graham, for respondent.

MOUNT, J.—This appeal is from an order of the trial court setting aside a verdict and granting a new trial in a condemnation action. The defendant has appealed from that order. The new trial was granted upon two grounds, as stated by the court: First, because of misconduct of the jury;

[1]Reported in 156 Pac. 24.

and second, because of the failure to give two instructions requested by the plaintiff.

This is the second appeal in this proceeding. Upon the first appeal, which was from the order of necessity and public use, we reversed an order of the superior court and remanded the case to the lower court to determine the damages to the defendant's property. The facts are stated in that opinion. *State ex rel. Washington Boom Co. v. Chehalis Boom Co.*, 82 Wash. 509, 144 Pac. 719.

A considerable portion of the appellant's brief is devoted to an argument to the effect that the court erred in considering affidavits of jurors upon the question of misconduct of the jury. In view of our conclusion that the trial court committed error in refusing to give the instructions mentioned, and the giving of another instruction which we shall notice, it will not be necessary to notice the question relating to the misconduct of the jury; for it is apparent that this, even if error, cannot occur again upon a new trial.

It is argued by the appellant that the court did not err in refusing to give requested instructions numbered two and three. At the trial, the plaintiff requested the court to give an instruction to the jury to the effect that they should accept as a fact that the Washington Boom Company, the plaintiff in the action, is a duly organized boom company under the statutes of the state, and has filed its plat of location covering the waters of Preacher's slough, and has constructed a boom thereon, and is entitled to enjoy the proceeds and assume the responsibilities of a boom company in the waters of Preacher's slough; that no other boom company could occupy with its boom the same space occupied by the plaintiff's boom. This requested instruction was refused. It should have been given because the facts are not disputed.

Request No. 3, refused by the court, was to the effect that while the defendant boom company is organized as a boom company, that fact could not be taken into consideration by the jury in order to enhance or affect the damage to which

the defendant boom company would be entitled for the property sought to be condemned in this proceeding; that the property rights of that company which are sought to be condemned in this action are simply private property rights not devoted to a public use by that company; that the jury must consider the property rights of the defendant in the same light as if those rights were not owned by the boom company, but were owned by private individuals.

The trial court, upon the motion for a new trial, concluded that he should have given the substance of these two instructions to the jury. We think the trial court was clearly right in this respect; for we held upon the other appeal, *State ex rel. Washington Boom Co. v. Chehalis Boom Co., supra*, that the property rights sought to be condemned were private property rights of the Chehalis Boom Company. In that opinion we said:

"But we are of the opinion that that appropriation, in the light of the long period of respondent's failure to use any portion of the waters of Preacher's slough in its boom business, must be regarded as of no avail to it as against the eminent domain right of relator here sought to be exercised. The necessary conclusion is that the property rights of respondent, which relator seeks to acquire by right of eminent domain, are simply private property rights, the title to which is in respondent, not devoted to public use and needed by relator for public use."

We think it follows from that decision that the trial court, in determining the award for damages, should have so instructed the jury. It is plain, therefore, that the trial court was right in granting a new trial.

The respondent contends that the trial court should have granted a new trial for the additional reason that an instruction given by the court to the jury was erroneous. That instruction was as follows:

"You are instructed that the defendant, the Chehalis Boom Company, owns the tide lands and bed of this slough in that portion thereof where the petitioner intends to con-

struct its boom, but the slough being a navigable body of tide water, it owns the bed of the slough subject to the rights of navigation on the part of the public; and, while it owns the bed of the slough, it would have no right to obstruct or interfere with the public right of navigation. It would, however, have the right to use and improve the tide lands along the side of the slough; and what is meant by the tide lands is the space between mean high tide and mean low tide. The petitioner, Washington Boom Company, by this action will acquire the right to use the tide lands within the limits of the boom for its corporate purposes."

In view of the fact that this question will necessarily arise upon a new trial, it is proper for us to decide the correctness of this instruction. We think it is plain that this instruction is erroneous. It is conceded that Preacher's slough is a navigable stream in which the tide ebbs and flows. As stated in the former opinion, this slough is some two hundred feet in width. It flows in a sinuous course in a general westerly direction, receiving its waters from the Chehalis river at its southerly shore, and empties into the river a distance of some four or five miles below. It is conceded that the Chehalis Boom Company has not acquired the shore lands upon this slough from the state. It appears that the Chehalis Boom Company acquired these lands from the Northern Pacific Railway Company; and it is claimed that, because this slough was not meandered, and because the slough runs diagonally across the lands purchased from the Northern Pacific Railway Company, the patent from the United States to the Northern Pacific Railway Company carried with it the shore lands and the bed of this slough.

This court has uniformly held that the state is the owner of the beds and shores of navigable streams, and has the absolute power to dispose thereof. Const., art. 17, § 1; *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278; *Bilger v. State*, 63 Wash. 457, 116 Pac. 19; *Austin v. Bellingham*, 69 Wash. 677, 126 Pac. 59; *State ex rel. Ham, Yearsley & Ryrie v. Superior Court*, 70 Wash. 442, 126 Pac.

945; *Grays Harbor Boom Co. v. Lownsdale*, 54 Wash. 88, 102 Pac. 1041, 104 Pac. 267; *Newell v. Loeb*, 77 Wash. 182, 137 Pac. 811; *Hill v. Newell*, 86 Wash. 227, 149 Pac. 951.

In *Hill v. Newell, supra*, we said at page 229:

"It is a rule that a grant from the government will not be enlarged by construction. . . . In consequence it has been the uniform holding of the supreme court of the United States that it will recognize and administer the law prevailing in the particular state when passing upon the extent of its own grant, when that grant is bordered or intersected by a navigable stream or lake." (Citing a number of cases.)

In *Hauge v. Walton*, 72 Wash. 554, 131 Pac. 248, we said:

"The government of the United States has granted to the state of Washington title to all tide and shore lands and to the beds of all navigable streams and lakes. This title is asserted in the constitution of the state, in various acts of the legislature, and acts amendatory thereto, and has been sustained by repeated decisions of this court. Plaintiff took under his patent to the line of ordinary high water. That line marked the limit of his boundary."

In *Newell v. Loeb, supra*, we said, at page 193:

"From these, and numerous other authorities which might be cited, it is plain that the state is the owner of the bed of the Duwamish river, being a navigable river, and that the appellants Loeb and Moyses have no interest therein. And the fact, if it is a fact, that their land borders upon the shore of the river does not give them any rights, either in the bed of the stream or in the waters thereof."

The appellant relies upon the case of *Kneeland v. Korter*, 40 Wash. 359, 82 Pac. 608, 1 L. R. A. (N. S.) 745. That was a case where the appellants sought to recover the possession of eleven acres of tide land constituting a portion of a fifty-one acre tract of land "surveyed, platted, and designated by the United States government as lot three, section thirteen, township nineteen, north, of range three west, Willamette Meridian, in Thurston county, Washington." In that case we held that, inasmuch as the land had been sur-

veyed, platted, and designated as a lot, and inasmuch as the railroad company had earned the title to this lot prior to the adoption of the constitution, this tract of land was disclaimed by virtue of art. 17, § 2, of the state constitution, because it was in effect patented land at the time the constitution was adopted. And we there said:

"The land in question was surveyed years prior to the time of the admission of this state into the Union, and prior to the filing of the map of definite location of route by the railway company. The enactment of the statute, the filing of the map of definite location, and the survey and platting of these lands, all having taken place years before Washington attained statehood, it must be presumed that the railway company was holding and claiming all of said lot three, including these tide lands, in accordance with said government survey, and that the constitution makers had in mind all such grantees when they adopted the disclaimer aforesaid."

We think that case is distinguishable from this by the fact that there the land had been surveyed and platted by the United States as government lots. These lots as surveyed and platted contained the tide lands there in dispute. The appellant in this case upon this question argues that, because this slough was not meandered by the government, it was therefore a part of the section granted to the railway company, and that, therefore, the shore and bed of the navigable water flowing across the land was included within the patent. We think this does not follow, because, as was stated in *Hill v. Newell, supra:*

"It is a rule that a grant from the government will not be enlarged by construction. 'The general rule of construction applying to grants of public lands by a sovereignty to corporations or individuals is that the grant must be construed liberally as to the grantor and strictly as to the grantee, and that nothing shall be taken to pass by implication.' "

In *Van Siclen v. Muir,* 46 Wash. 38, 89 Pac. 188, we said:

"But in this state the line of ordinary high water does not always determine the boundary line of the land of an upland

owner where his land borders on navigable waters. In grants made prior to the adoption of the constitution, as in the case at bar, it marks the boundary only where the navigable water has not been meandered by the government, or the meander line runs above the line of ordinary high water; where the meander line runs below that line, the meander line itself marks the boundary of the grant to the upland owner. See, *Washougal & La Camas Transp. Co. v. Dalles etc. Nav. Co.*, 27 Wash. 490, 68 Pac. 74, where the reason for the distinction is stated."

The case of *Kneeland v. Korter, supra*, is necessarily based upon the fact that the United States had surveyed, platted and designated a part of the tide lands as an upland lot; that is, the meander line was run below the line of ordinary high water. In such cases we have consistently held that the meander line becomes the boundary line. But where there is no meander line, then, under the decisions heretofore referred to, the limit of the grant from the United States is ordinary high water. It follows, therefore, that the grant from the government to the railroad company did not convey to the railroad company the shore lands or the bed of a navigable stream. The title to those shore lands and the bed of navigable waters remains in the state. It follows that the trial court was in error in instructing the jury that the Chehalis Boom Company was the owner of the tide lands and the bed of this navigable slough, and a new trial should have been granted for this error.

The order is therefore affirmed.

MORRIS, C. J., CHADWICK, and ELLIS, JJ., concur.

[No. 13043. Department Two. March 24, 1916.]

E. A. KITZMILLER *et al.*, *Respondents*, v. PACIFIC COAST & NORWAY PACKING COMPANY *et al.*, *Appellants*.[1]

CORPORATIONS—REPRESENTATION—AUTHORITY OF GENERAL MANAGER. The "general manager" of a corporation in apparent charge of its business of catching, canning, and selling salmon, without any limitations or restrictions as to his express authority, has implied authority to do whatever the corporation could do in the general scope of its business, including the employment of brokers to sell its products.

SAME—GENERAL MANAGER—IMPLIED AUTHORITY. Where the general manager of a corporation engaged in catching, canning, and selling salmon, had sold salmon and employed brokers therefor while manager of a branch office, his contract with brokers to sell 10,000 cases in advance of the opening market price, at about the then current price, is not so unusual in its terms as to be beyond his implied authority as a general manager, he having apparent authority to exercise his judgment in the matter.

Appeal from a judgment of the superior court for King county, Smith, J., entered April 27, 1915, upon findings in favor of the plaintiffs, in an action to recover a broker's commission, tried to the court. Affirmed.

Winfield R. Smith, for appellants.

Bronson, Robinson & Jones, for respondents.

HOLCOMB, J.—Respondents sued and recovered upon a broker's commission for services performed in selling 10,000 cases of canned salmon, upon a contract made with defendant corporation through its general manager, Joseph Kildall. The salmon was never delivered. Appellants' claims of error are grounded upon two general propositions, viz.: (1) Kildall had no express or implied authority; (2) the contract was unusual in its terms and without precedent. The arguments are elaborate, but the facts are plain and the issues are simple.

The Pacific Coast & Norway Packing Company, for several years prior to January, 1914, was a corporation en-

[1]Reported in 156 Pac. 17.

gaged in catching, canning, and selling salmon in Alaska. Its producing plants were located at two places in Alaska, and it had a general office in Seattle, and apparently had some corporate office in Minneapolis, Minnesota. In January, 1914, at a meeting of the company held in Minneapolis, Joseph Kildall was elected general manager of the company. He was also secretary of the company and had previously been designated as Seattle manager in charge of the company's office at Seattle. He had been associated with the company for a long period of years, having had the management of the Seattle office as far back as 1901. His authority as general manager was not specifically limited by any instructions given at the time of his election or otherwise shown. He was also one of the directors of the company. Apparently all matters of general management of the company's business were left to him.

In February, 1914, Kildall went to Pittsburgh for the purpose of securing tin plate with which to manufacture the cans to contain the ensuing season's pack of salmon, and also to borrow money to finance the year's business. He negotiated with the Phillips Sheet & Tin Plate Company of Weirton, West Virginia, to purchase the tin plate, and proposed to it that, if it would furnish the tin, his company would arrange to meet the payments on it by shipping the first 10,000 cases of the coming season's pack of early fish, to be ready in the latter part of July and the early part of August, on orders of P. Duff & Sons, with instructions to the latter to pay the proceeds of the 10,000 cases, as they came in, directly to the tin plate company. Respondents were not buyers, but were merely brokers making sales for commissions.

The arrangement proposed by Kildall to the tin plate company was first approved by the general sales manager, and in pursuance thereof Kildall gave the company its order for its tin plate requirements by a letter executed in triplicate on February 11, 1914, and accepted by the tin plate company. One of the provisions was that the arrangement was

made upon the understanding that Kildall's company would ship large quantities of salmon to the respondents and would instruct them to meet the payments therefor out of proceeds of the first shipments. Shipments were to be made the latter part of July and the early part of August, which would be before the naming of the opening prices of salmon by the Alaska Packers Association. The opening prices of salmon were generally fixed about August 20 to 25 of each year. The terms of the sale of the salmon were not then agreed upon, as Mr. Kildall desired to go on to New York to investigate the market prospects. On February 12, respondents wrote Kildall's company at Seattle as follows:

"We had the pleasure of having your Mr. Kildall here for the past three days, and while here he made purchase of approximately 7,000 boxes of tin plate, according to the specifications handed Mr. Watson of the Phillips Sheet & Tin Plate Company, with the understanding that you are to ship to us, on our orders, sufficient salmon to cover the amount of the purchase, as detailed in a copy of letter we have today written to the Phillips Sheet & Tin Plate Co., Weirton, W. Va. No doubt Mr. Kildall has advised you of this."

The letter of February 12 to the tin plate company, referred to, set out the understanding of respondents substantially as above detailed, stating further that they understood that Kildall would issue notes of the Pacific Coast & Norway Packing Company with his own personal indorsement to cover the value of the tin plate, and would ship to them on their orders sufficient salmon to cover the amount of these notes, the proceeds to be sent direct to the tin plate company. The tin plate company, without notice to respondents, immediately opened negotiations with Balfour, Guthrie & Company, their Pacific Coast agents, to have the latter guarantee the tin plate account, as the tin plate company was not in the business of financing matters of this kind. Balfour, Guthrie & Company at first refused to do so, because the appellants owed them a balance of about $7,000 on the previous year,

and therefore, on February 27, the tin plate company notified Kildall, then in Boston, that as their Pacific Coast agents, Balfour, Guthrie & Company, would not guarantee the account, he would have to make further arrangements before they would fill his order for the tin.

The tin plate company did not send any notice to the respondents of its procedure. Kildall, while in New York, succeeded in borrowing the sum of $25,000, out of which he arranged to pay the account due Balfour, Guthrie & Company, and after this arrangement was communicated to the latter, they wrote the tin plate company on March 25, saying that, on condition the account was paid in ten days, they would guarantee payment on the part of the packing company of the tin plate contract of February 11. Later, on April 13, Balfour, Guthrie & Company made their guaranty absolute. The tin plate company's concern was for fear the packing company would not make the shipments of salmon agreed upon, and it was to guard against loss from this source that it required the guaranty. Kildall remained in the east several weeks after his first visit to respondents at Pittsburgh, investigating the situation as to prospects of the salmon market and market prices in the east.

On the very day when negotiations by the tin plate company with Balfour, Guthrie & Company resulted in the guaranty by the latter, a further conference was held between Kildall and Mr. Watson, of the tin plate company, and respondents, and Mr. Watson made the point that his company could not know that plaintiffs could sell the salmon unless there was some fixed price named. In order to have the matter go through, Mr. Kildall agreed to ship the first 10,000 cases of salmon upon the fixed price of sixty-five cents per dozen cans, which would net approximately the full amount of the tin plate. The fish was to be packed and shipped from the early pack in July prior to the fixing of the opening prices by the association. Respondents were to take orders for 5,000 cases first, and then notify Kildall and receive additional authority

before disposing of the other 5,000 cases, and this they did. Respondents at all times refused to guarantee the tin plate company's account, although agreeing to remit the proceeds from the sales of the salmon direct to the tin plate company to meet the packing company's notes, and to assist the packing company in any way that they could towards getting the tin plate delivered as rapidly as possible. The price agreed upon for the salmon was made after a thorough canvass of the market conditions and prospects. It was fixed at sixty-five cents per dozen cans, price guaranteed against opening prices. Just what this guaranty amounted to was the subject of some discussion later between respondents and Kildall. Letters passed between them subsequently which apparently definitely fixed the agreement as to this point. Respondents negotiated sales for the first 5,000 cases of salmon, sent their orders therefor to the packing company at Seattle, telegraphed Kildall at Minneapolis for authority to proceed with the sale of the second 5,000 cases, which was given him on March 30, and the packing company at Seattle, through Mr. Kildall, subsequently acknowledged the orders for all the 10,000 cases as having been received by it. The tin plate company, as late as August 8, 1914, notified respondents that, in accordance with the arrangement, it was expecting them to look after the payments on the notes given by the packing company from the proceeds of the sale of the salmon.

On April 8, as shown by the minutes of the meeting of the directors of the defendant company, Kildall reported the arrangement whereby he secured the tin plate for which he gave the company's notes, and in connection therewith agreed to sell the 10,000 cases of salmon through respondents, as brokers, for early shipment before the naming of the opening prices, at sixty-five cents per dozen, the proceeds of such sale to be applied to the payment of the tin plate notes. This action was unanimously approved by the board. Subsequently Kildall was removed as general manager and the management of the company was given to one E. Schoenwald, and

Schoenwald, on August 27, on the part of the packing company, refused to carry out its contract with respondents.

It is claimed by appellants, that the sale of the salmon in advance at a price of sixty-five cents was at a very great loss; that if Kildall had any authority whatever to sell the salmon in advance, it should have been sold only subject to opening prices on or about August 20 of the current year as was customary, and not guaranteed against lower opening prices.

I. That Kildall had no express or implied authority to enter into the transaction complained of cannot be sustained upon reason or authority. As "general manager" without any limitations or restrictions as to his express authority, he had implied authority to do anything that the corporation could lawfully do in the general scope of its business. *Harvey v. Sparks Brothers*, 45 Wash. 578, 88 Pac. 1108; *Saunders v. United States Marble Co.*, 25 Wash. 475, 65 Pac. 782; *Chilcott v. Washington State Colonization Co.*, 45 Wash. 148, 88 Pac. 113; *Citizens' Nat. Bank of Tacoma v. Wintler*, 14 Wash. 558, 45 Pac. 38, 53 Am. St. 890; *Waldron v. Canadian Pac. R. Co.*, 22 Wash. 253, 60 Pac. 653. It assuredly was as much the corporate business of the company to sell as to catch and pack its products.

II. Nor is there any support for the assertion that, because the contract was unusual in its terms and without precedent, it was beyond the express or implied authority of the general manager. *Camacho v. Hamilton Bank-Note & Engraving Co.*, 2 App. Div. 369, 37 N. Y. Supp. 725, is cited to the effect that no presumption of law can be indulged in that, because a person acts as general manager, he has the power to bind his principal to contracts of an extraordinary nature; upon which principle a contract by a general manager employing an agent for an unusual length of time—three years—was held unauthorized; citing, also, *Carney v. New York Life Ins. Co.*, 162 N. Y. 453, 57 N. E. 78, 76 Am. St. 347, 49 L. R. A. 471; *Hyde v. Larkin*, 35 Mo. App. 365; *Baird Lumber Co. v. Devlin*, 124 Ala. 245, 27 South. 425;

Northwestern Packing Co. v. Whitney, 5 Cal. App. 105, 89 Pac. 981.

But upon a similar proposition, we held in *Slocum v. Seattle Taxicab Co.*, 67 Wash. 220, 121 Pac. 67, 39 L. R. A. (N. S.) 435, that where the superintendent of a company, having authority to employ and discharge such men as were needed about its business but only from day to day, and not authorized to enter into a written contract without the knowledge of the president, who was the only one authorized so to contract, executed an agreement with another engaging him, among other provisions, to do the company's work for a period of one year, the agreement was made in the course of the superintendent's or manager's apparent authority; and in *Brace v. Northern Pac. R. Co.*, 63 Wash. 417, 115 Pac. 841, 38 L. R. A. (N. S.) 1135, we held that the superintendent of the defendant corporation's dining car system had apparent authority to enter into a contract for the furnishing of menu cards with elaborate and fancy devices for the company's use and bind the company by his contract therefor. Analogous cases may be found in the following: *Alston v. Broadus Cotton Mill*, 152 Ala. 552, 44 South. 654; *Milledgeville Water Co. v. Edwards*, 121 Ga. 555, 49 S. E. 621; *Lewisville Light & Water Co. v. Lester*, 109 Ark. 545, 160 S. W. 861; *Law Reporting Co. v. Elwood Grain Co.*, 135 Mo. App. 10, 115 S. W. 475; *Manross v. Uncle Sam Oil Co.*, 88 Kan. 237, 128 Pac. 385, Ann. Cas. 1914 B. 827; *Edwards v. Plains Light & Water Co.*, 49 Mont. 535, 143 Pac. 962; *Jenkins Steamship Co. v. Preston*, 186 Fed. 609.

In the last case cited, it was held that the general manager of a steamship company has apparent authority and can bind the company by a contract employing the master of a vessel for two seasons, though employment of masters for more than one season is not customary. Appellants also cite *Gregory v. Loose*, 19 Wash. 599, 54 Pac. 33, quoting as follows:

"It is well settled in the law of agency that the extent of implied authority is limited to acts of a *like kind* with those

from which it is implied, and that an implied power is never extended by construction beyond the obvious purpose for which it is granted."

From this it is inferred by appellants that, because Kildall had never sold 10,000 cases of salmon at one time in advance of the catching and packing of the salmon, at sixty-five cents per dozen cans, he never had performed an act of a like kind. But it is shown by the evidence that Kildall had, while acting only as Seattle manager, whatever his authority there might have been, sold salmon, and had at other times employed respondents as brokers therefor. It certainly is not an unusual thing for any kind of producer to sell his products in advance of their production. Merchandise may be, and often is, sold in advance of its manufacture or production, and sometimes at a firm or fixed price and sometimes at a variable future price. It is known of all men that wheat growers sell wheat before it is ready for market; that horticulturists sell fruit before it is produced; and at times their sales are made on future prices as fixed by the market, and at times their products are sold for a present price. Whether it is better to sell at a fixed or firm price or at a variable future price depends chiefly upon the judgment and the condition of the seller. Kildall, as general manager, had apparent authority to exercise his judgment in the matter. It is shown in this case that, at the time Kildall sold the salmon in advance, salmon was selling at about the price at which he sold, and that there were large quantities of the previous year's production of canned salmon still unsold. It is contended by appellants that, at that time, the prospect for the market price for the future pack of salmon was the brightest that it had been in years. But we find nothing to justify this contention in the evidence, and can only find evidence that, at that time, the existing salmon in the market was selling for from sixty to sixty-five cents per dozen. Later, by some months, the prospects for the market of salmon for 1914 suddenly became very bright, and the price fixed at the opening of the market on August

28 of that year was ninety cents. But there was nothing at the time the sale was made, except the most sanguine hopes, to indicate that the market would open in 1914 at ninety cents or better.

Respondents fully performed their contract and are entitled to recover. The judgment is affirmed.

MORRIS, C. J., MAIN, BAUSMAN, and PARKER, JJ., concur.

[No. 13053. Department One. March 24, 1916.]

LEONA WILSON *et al.*, *Appellants*, v. ADA F. STONE *et al.*, *Respondents*.[1]

HUSBAND AND WIFE—COMMUNITY PROPERTY—LIABILITY—TORTS OF HUSBAND. Community property is not subject to the lien of a judgment recovered against the husband for a tort which was not committed for the benefit of the community.

QUIETING TITLE—RIGHT OF ACTION—VOID LIEN. Under Rem. & Bal. Code, § 785, an action to quiet title may be maintained to remove the cloud of a judgment lien against community property, although the judgment was against the husband for tort and not enforcible against the property; since the statute authorizes the action by any person claiming an interest where the invalidity of the apparent lien can only be shown by extrinsic evidence.

Appeal from a judgment of the superior court for Okanogan county, Edward H. Wright, J., entered May 4, 1915, upon findings in favor of the defendants, dismissing an action to quiet title, tried to the court. Reversed.

William C. Brown, for appellants.

CHADWICK, J.—This is an action to quiet title. Respondents had obtained a judgment against W. C. Wilson for a tort committed by him. The judgment stood as an apparent lien upon the property claimed by appellant Leona Wilson as her separate property. Upon issue joined, the court found

[1]Reported in 156 Pac. 12.

the property to be the community property of the appellants. If the property is community property, it is still not subject to the judgment under the bare fact of community ownership, under the rule declared in *Brotton v. Langert*, 1 Wash. 73, 23 Pac. 688; *Day v. Henry*, 81 Wash. 61, 142 Pac. 439.

The court also found that the tort was not committed for the benefit of the community, and entered a conclusion of law, "that said judgment is not a lien upon said land or any part thereof." He refused to enter a decree quieting title, and dismissed the action.

The old rule that an apparent lien, or one that, after a hearing, was found to be unenforceable by any legal process or proceeding, would not afford a ground for equitable relief, was recognized in *Lemon v. Waterman*, 2 Wash. Terr. 485, 7 Pac. 899, but it was held that it had no application, by reason of the statute, where the land was not in the possession of any one. Without reviewing the cases, it may be said that the statute, Rem. & Bal. Code, § 785 (P. C. 81 § 1335), and similar statutes, have since been given a broader interpretation, and that the action may now be maintained by any one who has a valid, subsisting interest in the property, and against any person claiming an interest, where the claim or lien is apparent and its invalidity can only be shown by resort to extrinsic evidence. 32 Cyc. 1317, 1324.

In *Crowley v. Byrne*, 71 Wash. 444, 448, 129 Pac. 113, an even broader rule is suggested. The court said:

"Indeed, whatever the rule may have formerly been in an action to remove a cloud, strictly speaking, we think under our present law that the defendant in an action to try title to land, whatever its nature, seldom, if ever, will be permitted to urge in defense of such action that the cloud which the plaintiff is seeking to remove or the claim which he is seeking to quiet his title against, is not a cloud or is not a valid claim. If this be a defendant's attitude, he can have no possible interest in the action except to avoid the taxation of costs therein against him, and this can readily be avoided by a disclaimer on his part. What right a defendant has under such

circumstances to say that the plaintiff may not have a decree removing a cloud which he conceives to be such, or a decree quieting his title as against a claim which he conceives may even in the slightest degree impair the full enjoyment of his title, is indeed difficult to conceive."

Reversed, with instructions to enter a decree in favor of appellants.

MORRIS, C. J., MOUNT, and ELLIS, JJ., concur.

[No. 13088. Department One. March 24, 1916.]

W. B. SMITH, *Appellant*, v. OLIVE R. GREENMAN *et al.*, *Respondents*.[1]

MORTGAGES—ASSIGNEE—BONA FIDE PURCHASER — FRAUD — NOTICE. Where one purchased a mortgage and agreed to pay only on condition that the mortgage "shall be a first and valid lien" upon the property, and paid for the same after notice of suit to cancel the mortgage for fraud, he does so at his peril and is not an innocent purchaser for value.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered January 29, 1915, upon findings in favor of the defendants, in an action to foreclose a mortgage, tried to the court. Affirmed.

McCain, Vinton & Burdett, McAulay & Meigs, and *H. J. Snively*, for appellant.

Magill, McKenney & Brush and *John C. Jenkins*, for respondents.

BAUSMAN, J.—Action to foreclose a mortgage which plaintiff agreed to buy of one Barnard on the 3d of March, 1914, and which he paid for and received on the 10th. The day before that payment, the makers served the original payee in a suit filed without *lis pendens* where the lands were situated,

[1]Reported in 156 Pac. 1.

to cancel the note and mortgage on the ground of fraud. Of this suit plaintiff claimed to have no knowledge, but the lower court, with good reason, found that he did have actual knowledge before making the payment, and as his promise to buy these securities was not unconditional, but only on condition that the mortgage "shall be a first and valid lien upon the premises hereinbefore described," we are not called upon to decide whether he is an innocent purchaser by relation and whether notice came too late. It came in time to excuse him from payment. As for the suit for cancellation, it was successful, so it is presumed to have been well founded from the start. Completing his payment under this situation, plaintiff proceeded at his peril.

It is not necessary to review the evidence of notice, as we are satisfied that, from certain peculiar circumstances, from the preponderance of witnesses, and out of the mouth of plaintiff himself, the court was abundantly justified in fixing notice upon plaintiff before the payment.

Judgment affirmed.

MORRIS, C. J., MOUNT, and ELLIS, JJ., concur.

[No. 13102. Department Two. March 24, 1916.]

HENRY BRICE, *Respondent*, v. S. H. STARR *et al.*, *Appellants*.[1]

JUDGMENT—BAR—SPLITTING CAUSES OF ACTION—EFFECT. Where plaintiffs, having deeded lands to defendants, who instead of securing an unpaid balance, defrauded the plaintiffs by mortgaging the lands to a third party and absconding, began two actions, the first, to recover damages in the amount of the mortgage, and the second to quiet title, which latter was amended to ask cancellation of the deed for the same fraud without asking a money judgment, judgment in the second action, granting cancellation, is a bar to recovery in the first action on the money demand; since the plaintiff attempted to divide a single cause of action, and judgment in the second suit concluded his rights (MORRIS, C. J., and HOLCOMB, J., dissenting).

SAME. It is immaterial that the mortgagee and another were made additional parties in the second action, since they were immaterial parties.

Appeal from a judgment of the superior court for King county, Ronald, J., entered July 17, 1915, upon findings in favor of the plaintiff, in an action for fraud, tried to the court. Reversed.

Bryan & Colvin, for appellants.

John W. Whitham, for respondent.

BAUSMAN, J.—Defendants, obtaining by agreement plaintiff's deed to certain land, hurriedly mortgaged it to an innocent third person and, instead of giving plaintiff security upon it, left the state with all they had borrowed. Plaintiff forthwith brought this suit in fraud to recover from defendants a sum equal to the mortgage which he would have to discharge. In the same month he brought a second action, which, as finally amended, was to cancel the deed for the same fraud, and that later suit reaching judgment first, he set it

[1]Reported in 156 Pac. 12.

up to reinforce this complaint with the fraud adjudicated. The defendants, after vainly endeavoring by demurrer and answer to exclude that record from this suit, finally retorted by themselves invoking it. The cancellation, they argue, involved the whole and present situation. If plaintiff did not get the money also in that suit, it must be presumed that it was either denied there or waived.

Now the fraud was not in obtaining the deed, but in violating its objects. It was impossible for plaintiff in his second suit to get a cancellation upon other ground than the fraudulent mortgaging. That, and that only, was the fraud. Consequently plaintiff attempted to divide a single cause of action. The judgment in the second cause concluded his rights. If he were not wronged by the mortgage, he had no right to have his land back, and when he got that back, he left out part of his redress if he did not ask for the mortgage money too. There was but one breach of contract or act of tort and all items of compensation should have been included. *Collins v. Gleason*, 47 Wash. 62, 91 Pac. 566, 125 Am. St. 891; *Collins v. Gleason*, 47 Wash. 69, 91 Pac. 568; *Carmean v. North American Transp & Trad. Co.*, 45 Wash. 446, 88 Pac. 834, 122 Am. St. 930, 8 L. R. A. (N. S.) 595; *Sullivan v. Baxter*, 150 Mass. 261, 22 N. E. 895; *Watkins v. Lawton*, 69 Ga. 671. The fact that, in the second suit, there were additional parties, the mortgagee as an additional defendant and the present plaintiff's wife as an additional plaintiff, does not alter the applicability of the judgment, for these were immaterial parties. *Kaufman v. Klain*, 69 Wash. 113, 124 Pac. 391. And how can plaintiff be allowed to raise this feature? It is he who first brings that judgment into this case to bind the defendant.

The learned trial judge, in an honest effort to prevent wrong, relieved plaintiff by estoppel through defendants' counsel. It seems that oral negotiations had sprung up between the latter and plaintiff's counsel about consolidating these two causes. The facts favorable to plaintiff are that the

second suit did not originally allege fraud, but was merely to quiet title without the actual facts. It could not finally have prevailed, indeed, except through evidence of the fraudulent mortgage, but it was free from inviting that issue. However, plaintiff's own counsel asked leave later to file in it a second amended complaint narrating substantally what he had already set up in the present and then also pending suit, and asking cancellation for fraud instead of mere quieting of title. Up to this point it might be conceived that he did this (though an unnecessary thing even for that purpose) in pursuance of expected consolidation, but he could not have been misled, because defendants' counsel immediately opposed in writing the attempted change. It was over their objection that he successfully duplicated the first action in the second with all but the prayer for money relief. He even went further. He included demands for damages in other items for use and occupation. Nor can his object in seeking a judgment on fraud in that case also be denied. He immediately pleaded it in this case to forestall the only defense possible and to leave the recovery of the mortgage money only a form.

Defendants' counsel roundly deny what plaintiff's counsel says about consolidation, and this court is forbidden by law to recognize the talk of lawyers out of court. Rem. & Bal. Code, § 130 (P. C. 25 § 21). Upon the record, defendants have vigorously resisted both suits. Nothing in their conduct implies expected consolidation. Everything indicates the contrary. When, after the second case was altered, they stipulated in writing that a certain deposition might be taken on behalf of plaintiff and used in *either* suit, it is to be noted that nothing was said about consolidation. While they frankly admit, to be sure, that they had expected consolidation, there is nothing to indicate the faintest intention that such consolidation or separate trial, either, should be after amendment, or judgment in the second case should better plaintiff's

position and close the mouths of defendants. The very contrary is at all times apparent.

In fine, there is here neither fraud nor accident nor mistake in the omission of a money claim in the suit that went first to judgment. Even a rascal is entitled to the law of evidence and to the established procedure. We have here a provoking case, but we could not relieve plaintiff without violating rights to which even the meanest are entitled. It was not the defendants, but plaintiff, who hurried and invoked the other judgment.

The judgment is reversed.

MAIN and PARKER, JJ., concur.

MORRIS, C. J., dissents.

HOLCOMB, J. (dissenting)—Whatever may have been the technical fault of counsel for plaintiff in bringing two separate suits when he should have brought but one, as I concede, or in failing to obtain the consolidation of the two suits even over the objection of appellants, the result of the above decision is to send the appellants forth free with $1,400 of ill-gotten gains. These they obtained by fraudulently mortgaging plaintiff's land, to which they had fraudulently obtained title. It seems to me that this court should not assist the appellants to effectuate such a palpable though roundabout grand larceny.

I therefore dissent.

[No. 13146. Department Two. March 24, 1916.]

L. R. FIFER, *as Fifer Lumber Company, Respondent*, v. LYNDEN LUMBER COMPANY, *Appellant*.[1]

PLEADING—AMENDMENTS—SURPRISE. Surprise is not a valid objection to the allowance of a trial amendment to the complaint, in the absence of a motion for a continuance.

SAME—AMENDMENT—COMPLAINT—DEPARTURE. Upon a complaint for breach of implied warranty of a car of lumber, in that it was not "out of kiln dried lumber and not rough or torn grain or fuzzy," it is not a departure to amend by alleging further that it had knot holes, pitchy pockets, seams, streaks, and checks, and other defects violating the warranty.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered May 10, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Bixby & Nightingale, for appellant.

Walter Metzenbaum, for respondent.

BAUSMAN, J.—The amended complaint alleged that defendant had sold plaintiff a car of lumber of the class "known in the lumber industry of the United States as moulding and No. 2 and better base boards," which car load plaintiff purchased without personal inspection, and as defendant well knew, for resale to an eastern consignee. Moulding and No. 2 and better base boards meant in the trade, he alleged, "out of kiln dried lumber and not rough or torn grain or fuzzy." These qualities were alleged to have been violated in the shipment.

During the trial, the court, over defendant's objection, permitted by further amendment the allegation to read that the shipment, besides being rough, torn, not kiln dried or smooth, had knot holes, pitchy pockets, seams, streaks, and shakes, was tied with tarred strings, was in part of narrower widths

[1]Reported in 156 Pac. 1.

than those required, of a grain torn and loosened, and not suitable for its intended purposes.

To complain of this change, in so far as surprise could be made a ground, defendant must have moved for a continuance, which it did not do. *Smith v. Michigan Lumber Co.*, 43 Wash. 402, 86 Pac. 652; *Ryder-Gougar Co. v. Garretson*, 53 Wash. 71, 101 Pac. 498, 132 Am. St. 1053. In consequence, all that it can urge now is that the change was so far beyond the scope of the pleadings as to be a radical departure. This last we are clear it was not. Most of it was repetition of previous allegations, much only evidentiary, and the rest at worst something closely allied to the original grievances. Those grievances arose in the sale of the lumber. These added features are but additional breaches of implied warranty, mere increase of the number of controversies springing from one sale. To allow such a change was within the lower court's discretion, subject, of course, to the defendant's rights if surprised.

This is the only assignment of error which seems to raise a question for our serious consideration.

Judgment affirmed.

MORRIS, C. J., MAIN, PARKER, and HOLCOMB, JJ., concur.

[No. 13149. Department One. March 24, 1916.]

E. W. FOWLER, *Respondent*, v. THE CITY OF SEATTLE, *Appellant*.[1]

STREET RAILROADS—OPERATION—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE. It is contributory negligence, as a matter of law, for the driver of a horse and wagon, after looking back and observing the approach of a street car a block away, running fast, to pursue a course parallel to the street car track to the next crossing, and to turn abruptly in front of the car without looking.

Appeal from a judgment of the superior court for King county, Frater, J., entered July 12, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained in a collision with a street car. Reversed.

James E. Bradford and *Melvin S. Good*, for appellant.

Charles M. Baxter, for respondent.

CHADWICK, J.—Respondent, a teamster of twenty years experience, was driving an express wagon north on Broad street, in the city of Seattle. He was driving along the east car track, the west track being, at the time, used for cars going both north and south. As he approached Seventh avenue north and when from thirty-five to fifty feet from the crossing, he looked and saw a street car approaching from the south. It was about a block and a half away as he then estimated the distance. A subsequent inspection and estimate fixed the distance at from three hundred to three hundred and ninety feet.

When respondent came to Seventh avenue he turned abruptly across the tracks. His horse had gotten over, but the car struck the wagon, demolishing it and injuring respondent. Negligence is alleged in that the car was being driven at an excessive rate of speed, and that no bell or warn-

[1]Reported in 156 Pac. 2.

ing was sounded to warn him of the near approach of the car. No claim is predicated upon the fact that the car was going north on the left track.

Appellant relies upon the defense of contributory negligence. Respondent says:

"A. I saw a car approaching about a block and a half. Q. After you had observed this car coming towards you, you didn't stop, after you once looked and saw this car approaching, you didn't at any other time pay any attention to it? A. No, sir, didn't pay no attention to it. Q. You simply went ahead and attempted to cross these tracks, didn't you? A. Yes, sir. Q. And you had crossed the right-hand track, that is, the right-hand track as you go from town? A. Yes, sir. Q. You had gotten clear over these tracks? A. Clear over. Q. And across the intervening space between the two tracks and onto the second, that is onto the left-hand track as you come from town? A. Yes, sir. Q. As I believe you testified, your horse had gotten over the last rail of the second track? A. Yes, sir. Q. So that the wagon then was immediately on the track itself? A. Yes, sir. Q. All this time, from the time when you first observed this car, you paid no attention whatever to the car itself? A. No, sir. Q. You weren't paying any attention so far as the car was concerned? A. No, I thought I was safe as it was. Q. Was there anything in front of your wagon to prevent you from seeing this car? A. No, sir. Q. What kind of a rig have you? A. I have got a horse and wagon. Q. Got a top on it? A. No, sir. Q. It didn't have a top? Q. There was nothing in the way, was there, to obstruct your view of the street car from the time you first saw it until it struck you? A. No, sir, nothing to obstruct me."

The fact is clear that respondent, after seeing a car approaching on a city street and appreciating that "they run pretty fast . . . like a whirlwind," and being in a situation that would indicate to the motorman that he intended to pursue a course parallel to the street car, suddenly turned in front of the car without looking and without taking any account for his own safety. We have held such conduct to be negligence and denied a recovery in the following cases:

Johnson v. Washington Water Power Co., 78 Wash. 616, 139 Pac. 392; *Beeman v. Puget Sound Traction, L. & P. Co.*, 79 Wash. 137, 139 Pac. 1087; *Gifford v. Washington Water Power Co.*, 85 Wash. 341, 148 Pac. 11; *Arpagaus v. Washington Water Power Co.*, 86 Wash. 83, 149 Pac. 346; *Briscoe v. Washington-Oregon Corporation*, 84 Wash. 29, 145 Pac. 995.

The case is on all fours, even to the contention that the car was exceeding the speed limit, with the case of *Johnson v. Washington Water Power Co., supra.* The rule as there laid down, is:

"By stopping at any time before he reached the railway track, the appellant would have been in a place of safety, and for one in his situation, knowing as he must have known had he looked in the direction of the car that it was almost upon him, to stop before attempting to cross the track would have been the exercise of only ordinary prudence and care. A motorman has the right to assume that a person on the street will exercise such care to avoid injury, and he may lawfully act on that assumption, until the conduct of the person warns him to the contrary."

Respondent relies principally upon: *Richmond v. Tacoma R. & Power Co.*, 67 Wash. 444, 122 Pac. 351; *Morris v. Seattle, Renton & Southern R. Co.*, 66 Wash. 691, 120 Pac. 534; *Gladen v. Seattle*, 83 Wash. 412, 145 Pac. 418.

The *Richmond* case is distinguished in the *Beeman* case. The *Morris* case is distinguishable in that the plaintiff there testified that he looked just before turning his horse toward the crossing, and that no car was in sight. He drove slowly onto the track, and then for the first time saw the car approaching so rapidly that he could not clear the crossing in time to avoid the collision. In the *Gladen* case, we held that one, knowing that another is in a place of danger, is bound to use a degree of care commensurate with the danger in which the one injured had placed himself. In other words, one who sees and appreciates the danger of another must use all reasonable care to protect him. If he does not, he himself

must answer as the author of the proximate cause. As in the *Johnson* case and the other cases cited, respondent voluntarily put himself in a dangerous situation without warning, and at a time when the exercise of reasonable care on the part of the motorman could avail him nothing in the way of protection.

Reversed and remanded with instructions to dismiss.

MORRIS, C. J., MOUNT, and ELLIS, JJ., concur.

[No. 13150. Department Two. March 24, 1916.]

HENRY S. ROYCE, *Appellant*, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, *Respondent*, NORTHERN PACIFIC RAILWAY COMPANY, *Defendant*.[1]

RAILROADS — ACTIONS — PROCESS—AGENT FOR SERVICE. The issuance of coupon tickets and through bills of lading for nonresident railroad companies does not make a resident railroad company an agent of the nonresident company for the purpose of service of process.

RAILROADS—SERVICE OF PROCESS—AGENTS. The fact that a soliciting agent was advertised as the "General Agent" of defendant railway company does not authorize the service of process upon him, under Bal. Code, § 4875, subd. 4, authorizing service upon any agent, where he derived no actual authority from the defendant, which had no interest in his office, and his reports were made to, and his salary was paid by, other companies.

Appeal from an order of the superior court for King county, Gilliam, J., entered May 25, 1915, quashing service of summons in an action for damages sustained through the loss of live stock. Affirmed.

Hartman, Nafe & Hartman, for appellant.

James R. Chambers, for respondent.

BAUSMAN, J.—Royce sued the nonresident Northwestern company by serving it through two alleged agents, an individ-

[1]Reported in 156 Pac. 16.

ual, Parker, and the Northern Pacific Railway Company. The latter was made a defendant on its own account also, but is involved in this appeal only as agent. The lower court sustained the Northwestern company's motion to quash both services.

As to the Northern Pacific's being an agent, the lower court was clearly right, since no other facts are shown than such as would make it agent here for every other railroad in the United States. The issuing, for nonresident companies, coupon tickets and through bills of lading is universally held insufficient to create agency.

As to the service on Parker, we are absolutely controlled by *Arrow Lumber & Shingle Co. v. Union Pac. R. Co.*, 53 Wash. 629, 102 Pac. 650, to distinguish this case from which nothing has been adduced except circumstances too trifling. Decide each case of this kind on its own facts, still the precedent is complete, for if anything of resemblance is wanting in the opinion, it will be found in the record. Even the relation of Parker to a subsidiary and registered company of the Northwestern company is that of Ellis in the *Arrow* case to a subsidiary of the Union Pacific.

To the *Arrow* rule and our prior decisions, we were driven by overwhelming authorities in the supreme courts of the United States and of our sister states, a current not since diminished but swollen. Shall the citizen, say of Colorado, sue the Northwestern company here and appropriate our courts concerning a shipment damaged in Wisconsin, instead of taking his grievance to Colorado or Wisconsin? He may if Royce, our own citizen, may, and if Parker be its agent here, for our courts are open to nonresidents for controversies in contract and tort, even when arising in other jurisdictions. *Hunter v. Wenatchee Land Co.*, 36 Wash. 541, 79 Pac. 40; *Reynolds v. Day*, 79 Wash. 499, 140 Pac. 681, L. R. A. 1916A 432; *Rosenbaum v. Evans*, 63 Wash. 506, 115 Pac. 1054.

Considering the multitude of corporations and that, unlike individuals, they can be served through agents, all courts have shrunk from a rule which would soon swamp home tribunals with foreign brawls. Nor have we any desire, through the same rule, to expose our own incorporated merchants and carriers on like service to suits in every other state. Undoubtedly the universal opinion that solicitors for nonresident railroads and commercial houses are not agents for local service arises from these two apprehensions, and it was also foreseen to be unfair, as well as injurious to interstate commerce, to subject such principals to suits in our more than forty states, while the plaintiffs in most cases would be exposed to suit only at home.

MORRIS, C. J., MAIN, and PARKER, JJ., concur.

[No. 13154. Department One. March 24, 1916.]

EDWIN CHAMBERS, *as Edwin Chambers Company, Respondent*, v. INDEPENDENT ASPHALT PAVING COMPANY, *Appellant*.[1]

EVIDENCE—DECLARATIONS—THIRD PERSONS—ADMISSIBILITY. In an action by a dealer for the price of automobile tires sold, evidence of a conversation between representatives of the tire company, had when the plaintiff was not present and of which plaintiff had no knowledge, is inadmissible to prove that defendant bought the tires direct from the tire company.

SAME. In an action by a dealer for the price of automobile tires sold, evidence of a settlement between defendant and the tire company covering tires sold to defendant by the company is inadmissible.

PRINCIPAL AND AGENT—FACT OF AGENCY—EVIDENCE—ADMISSIBILITY. In an action by a dealer for the price of automobile tires sold, claimed by defendant to have been furnished under a contract with the tire company, it is not prejudicial error to strike the statement of a witness that plaintiff was "agent" of the tire company, where it

[1]Reported in 156 Pac. 14.

was not shown that he was such agent for the purpose of carrying out the tire company's contract.

SAME—FACT OF AGENCY—ACTIONS BY AGENT. A dealer, having an agency for automobile tires to be sold generally at certain prices and to defendant at a discount, may maintain an action in his own name for the price of tires purchased from the company and paid for by him and sold to the defendant, it not appearing that he was the agent of the company for any other purpose.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 16, 1915, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

A. R. Titlow, for appellant.

Govnor Teats, Leo Teats, and *Ralph Teats*, for respondent.

MOUNT, J.—This action was brought to recover from the defendant $1,084.76, alleged to be due the plaintiff on account of solid United States automobile tires alleged to have been sold to the defendant between May 16, 1913, and August 4, of that year.

The answer of the defendant denied that the plaintiff sold the automobile tires to the defendant, and alleged that all tires used by the defendant purchased after February 1, 1913, were purchased directly from the United States Tire Company with headquarters at Seattle; that, during the year 1913, it had a contract with the United States Tire Company to furnish solid tires at dealer's prices, less ten per cent, and less five per cent for cash; that the contract was entered into upon the consideration that the defendant would cease using Goodrich tires and use United States tires as rapidly as Goodrich tires then in use by the defendant were worn out, and that the United States Tire Company agreed to replace said tires and change the rims of the wheels and bear all the expense of such change; that the defendant, at that time, was using four trucks in

the city of Tacoma; that all the tires purchased by the defendant were paid for directly to the United States Tire Company.

The answer further alleges that the United States Tire Company agreed to guarantee each tire to a service of ten thousand miles' use, and to replace any tire that did not give this use, on a mileage basis, on the purchasing of a new tire; that the defendant has paid for all tires purchased, including the tires received from the plaintiff.

For a reply, the plaintiff denied all new matter set up in the answer. Upon these issues the case was tried to the court without a jury, and at the conclusion of the evidence, findings were made and a judgment was entered in favor of the plaintiff for $1,025.90. The defendant has appealed from that judgment.

Upon the trial of the case, the plaintiff testified that he had furnished certain tires, item by item; that he had sold these tires to the defendant at a discount of ten per cent from consumers' prices, upon a ten-thousand-mile guarantee; that he had paid the United States Tire Company therefor; but that the defendant had refused to pay the plaintiff. He also testified that he purchased the tires from the United States Tire Company under a contract with that company that all tires were guaranteed upon a mileage basis; that, at the time he entered into the contract with the United States Tire Company to handle the tires of that company, he was told that an agreement had been made by which he was to furnish the defendant tires at a ten per cent reduction from the consumers' price. He was also informed that he was to divide the cost with the United States Tire Company of the change of rims necessary to accommodate the United States Tire Company's tires to the automobiles owned by the defendant.

The contention of the defendant was as outlined in the answer, to the effect that the plaintiff was a stranger to the contract between the defendant and the United States

Tire Company; but that the defendant was instructed that, when it wanted a tire, it could obtain the same either from Mr. Chambers or from the Seattle office. It was admitted that defendant obtained a number of tires from Mr. Chambers, and it was admitted that defendant had not paid Mr. Chambers therefor. The defendant sought to show that Mr. Chambers was informed of all the terms of the contract between the defendant and the United States Tire Company, and that the tires furnished by Mr. Chambers were furnished for and on behalf of the United States Tire Company.

At the trial of the case, one Mr. Baisden was called as a witness on behalf of the defendant. The defendant offered to show by this witness "that Mr. Stevens, who made the contract representing the U. S. Tire Company, gave him full instructions to carry into execution as to prices and delivery, and that it was carried out." This offer was denied by the trial court, and is one of the errors assigned by the appellant. This offer was to show a conversation between Mr. Stevens, who represented the United States Tire Company, and Mr. Baisden, who also represented that company and who succeeded Mr. Stevens, that Mr. Stevens gave Mr. Baisden full instructions to carry into execution the contract concerning prices and delivery. We think this evidence was incompetent for the reason that Mr. Chambers was not present at that conversation, took no part therein, and it is apparently not claimed that Mr. Chambers knew of the conversation. It is apparent that, unless Mr. Chambers was constituted the agent of the United States Tire Company to deliver tires to the defendant upon account of the United States Tire Company, or unless he was a party to the contract, he would not be bound by any conversation between third parties.

The defendant also offered to show by the same witness that this witness, representing the United States Tire Company, made a settlement with the defendant for tires that

were sold prior to September, 1913; and also afterwards covering all sales of United States tires made to the defendant. This evidence was also excluded and, we think, properly, because whatever settlement was made with the defendant by the United States Tire Company, would not bind this plaintiff for tires which the plaintiff had bought from the tire company and which were sold by the plaintiff to the defendant.

The same witness was asked to state what relation Mr. Chambers bore to the United States Tire Company. He answered, "Agent." This evidence was stricken out upon motion of the defendant, and is alleged as error. It was admitted by Mr. Chambers that he had the right to sell United States tires in Tacoma, and to that extent he represented the tire company. There was no offer to show that Mr. Chambers was the agent of the United States Tire Company for the purpose of carrying out a contract which the United States Tire Company may have had with the defendant. We think, therefore, that this was not prejudicial error.

A number of errors are assigned to the effect that the court erred in making findings in favor of the plaintiff, and in refusing to make findings requested by the defendant. It is unnecessary to discuss these in detail, because a careful reading of the record convinces us that the tires alleged by the plaintiff to have been furnished to the defendant were furnished, and were paid for by the plaintiff to the United States Tire Company, and were not paid for by the defendant, either to the United States Tire Company or to the plaintiff, from whom the tires were obtained.

One of the questions in the case was whether the tires which were furnished were to be furnished to the defendant at consumers' prices, less ten per cent, or at factory prices, less ten per cent. There appears to be considerable difference between these two prices. The trial court was of the opinion that the price at which Mr. Chambers was to furnish tires to the defendant was consumers' prices, less ten per

cent. We are satisfied that this is in accordance with the preponderance of the evidence.

The appellant further contends that the plaintiff was not authorized to maintain this action, because he was simply an agent, and that the action should have been maintained by the principal. If we were to assume that the plaintiff was simply an agent for the purpose of carrying out a contract of his principal, this rule might apply. But we think the evidence fails to show that the plaintiff in this case was such agent. While it is conceded that he was an agent of the United States Tire Company, so far as the sale of their tires was concerned, in the city of Tacoma, that agency extended only to the right to purchase and sell such tires. To be sure, the plaintiff knew there was an agreement between the defendant and the United States Tire Company that the defendant should be entitled to purchase tires at a discount. This applied not only to Mr. Chambers, who was a dealer in Tacoma, but to other dealers who were handling United States tires at other places in the state. The tires which were furnished by Mr. Chambers were tires which were purchased by him from the United States Tire Company under an agreement to sell them generally at certain prices, and to the defendant at a discount of ten per cent upon the consumers' price. The record fails to show that he was an agent for other purposes. And we think it is conclusively shown that the tires which Mr. Chambers furnished to the defendant were furnished upon that basis, and were not paid for by the defendant. He was therefore clearly entitled to a judgment for the price of the tires.

We find no reversible error in the record. The judgment is therefore affirmed.

MORRIS, C. J., CHADWICK, FULLERTON, and ELLIS, JJ., concur.

[No. 13158. Department One. March 24, 1916.]

L. Bernheimer *et al.*, *Respondents*, v. J. M. Rezek, *Appellant*.[1]

Appeal—Review—Findings. Findings of the trial court on conflicting evidence will be sustained where it cannot be said that they are not sustained by a preponderance of the evidence.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, entered December 17, 1914, upon findings in favor of the plaintiffs, in an action for rent, tried to the court. Affirmed.

Cade & Barrows, for appellant.

Thomas & Hannan and *G. G. Hannan*, for respondents.

Per Curiam.—Appellant was sued as the assignee of a lease. He paid rent at the price stipulated in the lease for the time he actually occupied the premises. He denies that there ever was an assignment and contends that he is not liable for the rent for the term, under the rule announced in *Tibbals v. Iffland*, 10 Wash. 451, 39 Pac. 102, and *Harvard Inv. Co. v. Smith*, 66 Wash. 429, 119 Pac. 864.

Whether appellant bought the business and the lease and assumed its obligations, is a question of fact. Two witnesses testified positively that a written assignment was made out, acknowledged formally and accepted by appellant. Another witness testified that appellant admitted to him that he had such an assignment. Appellant and his son testified that there was no such assignment.

The concomitant circumstances, that appellant and respondent husband negotiated for a new lease, and the payment by appellant of the stipulated rent for seven months—albeit he complained that the rent was too high—seem of equal weight. The trial judge might have decided the case

[1]Reported in 156 Pac. 16.

either way. Having decided in favor of respondents, we are not prepared to say that his findings are not sustained by a preponderance of the evidence, and the judgment is therefore affirmed.

[No. 13207. Department One. March 24, 1916.]

GEORGE L. OSBORNE *et al.*, *Appellants*, v. PHOENIX INSURANCE COMPANY OF HARTFORD, CONNECTICUT, *Respondent*.[1]

INSURANCE—FIRE INSURANCE — ISURABLE INTEREST — VENDEE'S LIABILITY TO CREDITORS—SALES IN BULK. Where a stock of goods worth $2,600, insured for $2,000, was sold and transferred for $300, with the accompanying affidavit required by the sales-in-bulk law (Rem. & Bal. Code, §§ 5296, 5297) showing creditors whose goods to the amount of $2,300, had not been paid for, the purchaser assumed the liabilities to the extent of the value of the goods, and hence had an insurable interest therein and could collect the insurance; notwithstanding an agreement between the parties to the sale that the goods unpaid for were to be returned to the creditors, since the creditors had not consented to that arrangement and were entitled to be paid in cash (MORRIS, C. J., dissenting).

TRIAL—ISSUES—DIRECTION OF VERDICT. In an action on an insurance policy in which plaintiff's valuation of the goods was denied by the defendant, but defendant failed to put in any proof upon the announcement of a directed verdict for plaintiff in a reduced sum, the court would not be justified in directing a verdict for the face of the policy, as defendant was entitled to try out the issue.

Appeal by plaintiffs from a judgment of the superior court for King county, Ronald, J., entered November 16, 1915, upon the verdict of a jury favorable to the defendants, by direction of the court, in an action on a policy of fire insurance. Reversed.

Myers & Johnstone, for appellants.

Halverstadt & Clarke, for respondent.

[1]Reported in 156 Pac. 5.

MOUNT, J.—This action was brought upon a fire insurance policy, to recover for the value of goods insured and lost by fire. The face value of the policy was $2,000. The answer admitted the policy and that proofs of loss were furnished thereunder, but denied that the goods were of the value alleged. For an affirmative defense, it was alleged that the assured was not the owner of the goods, but held a chattel mortgage thereon for $300; and that the assured falsely represented to the insurance company that he was the owner of the property. For a further answer, the defendant alleged that, under the terms of the policy, it became void if the interest of the assured was other than unconditional and sole ownership; and that the assured, at the time of the fire, was not the unconditional owner of the property. Upon these issues, the case was tried to the court and a jury.

At the close of the plaintiff's evidence, the defendant moved for a dismissal, for the reason that the evidence showed that the plaintiffs' sole interest was that of chattel mortgagee. The trial court denied this motion, but stated, in substance, that it would instruct the jury to return a verdict in favor of the plaintiffs for $300, by reason of the fact that no title to the goods which had been placed in the stock by creditors passed by the bill of sale to the plaintiff Osborne. The defendant, after the court had made this ruling, announced that it was satisfied therewith, and rested. The plaintiffs thereupon moved for an instructed verdict for $2,000, the face of the policy, which motion the court denied. The jury, upon instruction by the court, returned a verdict in favor of the plaintiffs for $300. The plaintiffs have appealed from the judgment entered upon the verdict.

It appears that, on April 25, 1915, one George W. Pate was conducting a grocery store and meat market in Seattle. On that date he procured from the defendant a policy of insurance for $2,000 upon his stock of goods and fixtures. On May 20, 1915, Mr. Pate sold this stock of goods and fixtures to Mr. Osborne, by bill of sale, for an express consid-

eration of $300. At the time of this sale, Mr. Pate made and delivered to the purchaser a list of creditors, with their residences, and the amount due each creditor. On the date of this sale, Mr. Pate assigned the policy of insurance to Mr. Osborne; and upon the same date, the insurance company consented in writing to such assignment. On that night, the place and all the goods therein were entirely destroyed by fire. Thereafter proofs of loss were made; and the insurance company refused to pay, for the reason that Osborne was not the owner of the goods; that his only interest therein was that of a mortgagee for the sum of $300.

At the trial of the case, Mr. Pate testified as follows:

"Our understanding was that I transfer the stock and goods, wares and merchandise, all the fixtures and stock to Mr. Osborne with the understanding that we return to the creditors the goods that belonged to them, the same as we did Sylvester."

It appears that, prior to the sale, Sylvester Brothers, who were creditors of Mr. Pate, had taken away from the store goods which they had sold to Mr. Pate. Thereupon, in answer to questions propounded by the court, the witness testified as follows:

"Q. (By the Court). I take it you mean the goods that each creditor had put in there? A. Yes, sir. Q. You could identify them? A. Yes, sir; we could each and every article. Q. Did you fix the amount of goods which the creditors were to take out of that store in amount? A. I don't know each separate amount, but it could be segregated from the invoices. Q. Can you tell me approximately the amount that they were to take out? A. No, sir; I don't believe I could. . . . Q. Could you take your invoice, plaintiff's exhibit C., and tell me the value of the goods which you expected to take out of the store and return to the creditors? A. This invoice here includes all of the grocery and meat fixtures together, and the goods to be returned were principally groceries and grocery fixtures. Q. Can you tell what amount of goods were to be returned to the creditors out of the stock of goods in value? A. The invoice shows about $2,300 and

something. Q. Do you mean the $2,300 was to all go back to the creditors? A. Nearly all of it; yes, sir. Q. And Mr. Osborne would have what remained in the store after the $2,300 went out? A. He would have the location and the store as it stood after the goods were out. Q. Then practically all the stock was to go out and Mr. Osborne would retain the store and the location? A. Yes, sir. Q. As I understand, for my own guidance here, after Sylvester Brothers took their goods out, there was about $2,300 worth of goods left in there? A. Yes, sir. Q. That you had bought from other creditors? A. Yes, sir. Q. And not paid for? A. Not paid for all of them; no, sir. Q. Those goods that were not paid for were to be returned to the vendors? That is correct? A. Yes, sir. Q. And the only goods that you sold were such goods as you had paid for? A. Yes, sir. Q. You didn't sell, and didn't intend to sell, any goods that were in that store that had been placed there by some other creditors and which you had not yet paid for? A. I mentioned some of these in the bill of sale, that it was the understanding that they were to be sent back."

Mr. Osborne, who purchased the store, testified as follows:

"Q. You understood that all of the goods which Mr. Pate had purchased which were not paid for were to go back to the creditors? A. Yes, sir. Q. And you didn't understand that this bill of sale covered any of those goods? A. Yes, sir; I had the bill of sale to hold him, with the understanding that they go back to the creditors. I was held responsible for them. Q. You didn't understand they were your goods? A. They were mine until they were turned; yes, sir; because the bill of sale covered them. Q. You knew that Sylvester had already taken his? A. I knew he got part of it; yes, sir. Q. And you knew the rest of these people would come up and get them and take them out? A. Mr. Pate said they would, and I supposed they would. Q. You didn't expect, when these people came up and asked for their goods, you didn't expect to refuse them? A. No, sir. Q. To claim them? A. No, sir. Q. You expected to let them take them out? A. Certainly; yes, sir."

The witness also testified that the value of the goods paid for that were not to be returned was a good $300.

We are satisfied that, under this evidence, the trial court erred in instructing the jury to return a verdict for $300. The bill of sale from Mr. Pate to Mr. Osborne was, upon its face, an absolute transfer of all the property to Mr. Osborne. It was either what it purported to be, or it was a security merely for the amount that was owing Mr. Osborne. If it was what it purported upon its face to be, a sale of the whole stock of goods to Mr. Osborne, then the insurance company was liable for the value of the goods lost.

It is argued by the respondent that the evidence which we have heretofore quoted shows that the only interest which Mr. Osborne had in the goods was $300, which he paid therefor, and that he acquired no title to the goods in the stock which were to be returned to the creditors. It is also argued that the policy of insurance is an indemnity to the individual; and that, inasmuch as the interest of Mr. Osborne in the goods was $300, the insurance company was liable only for that amount.

It is no doubt correct, as argued by the respondent, that the contract of insurance is a contract of indemnity; and if the evidence in this case shows that Mr. Osborne, when he purchased the stock, obtained only a $300 interest therein, the respondent's position would be correct. But we think the evidence quoted fairly shows that the whole interest of Mr. Pate in the store and stock of goods was transferred by the bill of sale to Mr. Osborne. Mr. Osborne thereupon took possession of the stock of goods and the store, and immediately became liable to the creditors, the same as Mr. Pate was before the transfer. A fair construction of the evidence above quoted is that there was an understanding between Mr. Pate and Mr. Osborne that the creditors would be permitted to take their goods out of the store in payment of their claims. But there is no showing in the record that the creditors had agreed to this. So far as the record shows, the creditors knew nothing of this transfer from Mr. Pate to

Mr. Osborne, or of the agreement between them. Mr. Osborne was aware of the fact that Mr. Pate was owing a large amount upon the goods, because an affidavit accompanied the bill of sale showing the different creditors, and the amount due each. Without this affidavit, the sale, under the sales-in-bulk law, Rem. & Bal. Code, §§ 5296, 5297 (P. C. 203 §§ 9, 11), would be void and of no effect as to the creditors. Clearly the object of these sections of the sales-in-bulk law was to protect creditors in case of a sale of goods in bulk.

Mr. Osborne, when he purchased the stock and took possession of it, necessarily assumed the liabilities to the extent of the value of the goods, even though there was no express agreement between him and his vendor to that effect. If the vendor, Mr. Pate, and the vendee, Mr. Osborne, did agree that certain goods should be taken out of the stock and delivered to the creditors, that agreement was not binding upon the creditors. They were entitled to have their claims paid either in cash or goods as they saw fit. And when Mr. Osborne took the goods under those conditions, he became liable for the goods in his possession. He therefore had an insurable interest. They were, as between him and the insurance company, his goods. If they were destroyed or taken away while in his possession, the loss was his loss, and he was liable to pay the claims of the creditors. So it seems clear to us that Mr. Osborne had an insurable interest in the goods at the time the policy of insurance was transferred to him. The court, therefore, erred in directing a verdict for $300 in favor of the plaintiffs.

We are also satisfied that the trial court would not have been justified, under the circumstances, in directing a verdict for the face of the policy, because the value of the goods, as alleged in the complaint, was denied by the defendant. It had a right to have the jury determine the value of the goods upon evidence which it was authorized to introduce

under its answer. When the court announced that it would instruct the jury to return a verdict in favor of the plaintiffs for $300, the defendant was satisfied with that instruction, and, for that reason alone, rested its case without introducing any evidence. We think the trial court should have permitted the defenses to be shown, and submitted the case to the jury upon the issues presented upon all the evidence.

The judgment is therefore reversed, and the cause remanded for further proceedings.

CHADWICK, FULLERTON, and ELLIS, JJ., concur.

MORRIS, C. J. (dissenting)—A fire insurance policy, like any other contract, is to be construed according to its terms. In this instance it protected Osborne against the loss sustained by him. That loss was only $300. I cannot accept as law a rule that construes the policy as a contract to pay for the goods lost, irrespective of the loss sustained by the insured. The latter and not the former is the rule. I therefore dissent.

[No. 13246. Department One. March 24, 1916.]

J. E. McGILLIVRAE *et al.*, *Appellants*, v. THE CITY OF BREMERTON *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS — IMPROVEMENTS — CHANGING CONTRACT. Where a contractor was unable to complete his contract at the original contract price, it is not a fraud upon the property owners for the city to allow him to finish the work by force account at cost and ten per cent added.

SAME—IMPROVEMENTS — CERTIFICATE OF ENGINEER — APPROVAL OF ACCOUNT. Where there was no fraud, the certificate of the engineer and the approval of the city council as to work done by force account—cost and ten per cent added, is binding so far as the amount to be paid for the work is concerned.

SAME—IMPROVEMENTS—WARRANTS—IRREGULARITY IN ISSUE. The issuance of warrants for public work before approval by the city council is but an irregularity, and is merged in the final award when the city made final settlement.

DISMISSAL AND NONSUIT—WITH PREJUDICE. In an action by property owner for injunctive relief against alleged fraudulent excesses over the contract price, in which no fraud was shown, a dismissal with prejudice barring any subsequent action is proper.

Appeal from a judgment of the superior court for Kitsap county, Gilliam, J., entered June 26, 1915, upon granting a nonsuit, dismissing an action for equitable relief, tried to the court. Affirmed.

Garland & McLane, for appellants.

Thomas Stevenson and *Williamson, Williamson & Freeman*, for respondents.

CHADWICK, J.—In the year 1912, the city of Bremerton let a contract to one L. Y. Slayton for the construction of a sewer. The estimated cost, if laid with vitrified clay pipe, was $42,000; with cement, one-third less. The contract called for the building of the sewer complete, according to

[1]Reported in 156 Pac. 23.

the plans and specifications, for the sum of $21,998.10. Other costs in the way of clerical assistance, advertising, etc., made up the sum of $3,259.81, or $25,257.91 as the price chargeable to the district. The contract also called for extra payment if extra manholes or catch basins were put in, and other extra work at the cost of labor and material with ten per cent added.

The contractor set about to perform his contract. After expending something over $10,000, it became apparent that he would default at the price agreed upon, and he threw up the contract. The contract was declared forfeited. The respondent Scandinavian American Bank had agreed to take all warrants issued to the contractor at par to the full extent of the contract price. A few days after forfeiture, the respondents, the city, the bank and the contractor came together and it was agreed that the contractor should proceed to do the work according to the plans and specifications, and that he should be paid therefor by force account, that is, actual cost of the material and labor and ten per cent added. Whereupon the council passed a resolution "reinstating contractor in District No. 62." The work was paid for as it progressed. The final statement or claim filed by the contractor showed a cost of $40,927.63. The completion of the work and the cost thereof were certified by the city engineer. Upon examination, the city council reduced the amount claimed for the whole work $1,200, and approved the claim. Warrants were issued for the balance due. We understand that the warrants have since been redeemed and bonds issued in lieu thereof.

Two assessment rolls have been made up. After the second roll had been made, and after the time for objection and appeal had expired, appellant and others discovered that the amount paid was greatly in excess of the original contract price, and brought this action to restrain respondent bank from transferring any of its warrants, and the city from paying anything more than the original contract price, with

interest, and that all warrants and bonds in excess thereof be declared void.

Injunctive relief is prayed for on the grounds that the contract was in no way modified by the subsequent proceedings; that the contractor was still bound to perform at the contract price; that all warrants in excess of the contract price are without consideration, fraudulent and void; that no extra work was ordered "in writing" as the contract required; that all warrants issued after the new understanding were issued by the clerk upon the sole O. K of the contractor or his agent; that they were issued without reference to, or allowance by, the city council.

Appellants say that the alleged frauds were not discovered until after the assessment rolls were approved and after the time for filing protests had passed. The court below held that appellants should have appealed from the assessment roll, and that he was unwilling to find fraud upon the record as made.

Granting that a citizen can pursue a remedy in equity after the time for protest and appeal has passed, if he has been the victim of fraudulent practices on the part of the city officials, we think appellants have not sustained their case. Fraud is not to be presumed. It is a fact to be proven. To raise an inference of fraud in this case, compels a holding that the contractor was bound to complete the work at the original contract price. Such is not the case. When it became apparent that he could not do so, it was agreed that the work should be finished and that he would be paid by force account, that is, the cost of the material and labor and ten per cent added. A new compensation was agreed upon in lieu of the unit price at which he had failed. There is no testimony showing, or tending to show, the amount paid was more than the actual cost and ten per cent added.

Appellants have advanced from a wrong premise, and having made proof accordingly, are, in consequence, without proof of anything from which the fraud of the parties

respondent can be inferred. There being no finding of fraud, it follows that the certificate of the engineer and the approval of the council are binding, and close the question so far as the amount to be paid for the work is concerned. 1 Elliott, Roads & Streets (3d ed.), § 654; *Morehouse v. Clerk of Edmonds*, 70 Wash. 152, 126 Pac. 419; *State ex rel. Murphy v. Coleman*, 71 Wash. 15, 127 Pac. 568; *Hutchinson v. Spokane*, 72 Wash. 56, 129 Pac. 892.

The record hardly bears out the statement that any warrants were issued before the claims were approved by the council. The clerk says positively that no warrants were so issued, but if so, the council having power to make the settlement that was made, it would follow that any question that might arise as to the right of the city clerk to issue warrants before the claims were approved by the council is no more than a challenge for irregularity which, of necessity, is merged in the final award.

Appellants complain that the case should not have been dismissed with prejudice. Appellants can have no relief except for fraud of the city council. Any action against any party directly or indirectly concerned must be predicated upon that charge. They have made their challenge and failed to show a legal fraud. The judgment is final and a bar to any subsequent action. *Michel v. White*, 64 Wash. 341, 116 Pac. 860.

Affirmed.

MORRIS, C. J., MOUNT, and HOLCOMB, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 12957. Department Two. March 28, 1916.]

P. PETERSON *et al.*, *Respondents*, v. J. J. NICHOLS, *Appellant*.[1]

JOINT ADVENTURES — MUTUAL RIGHTS — ACTIONS — CONTRIBUTION. Parties engaged in the business of owning and managing a stallion are engaged in a joint adventure and not in a general partnership, the rules of which do not apply; hence an action for contribution lies, although there had been no accounting, where one party has been compelled to pay more than his share of the common liability and the other party was under legal obligation to pay at the time the payment was made.

Appeal from a judgment of the superior court for Lincoln county, McCroskey, J., entered November 8, 1913, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for contribution. Affirmed.

H. N. Martin, for appellant.

F. K. P. Baske and *Merritt, Lantry & Merritt*, for respondents.

HOLCOMB, J.—This case was here on a former appeal and reported in 71 Wash. 656, 129 Pac. 373. A summary of the pleadings is there set forth, the pleadings being in the same state at the last trial as at the first.

In the former decision, it was held that appellant should have been permitted to offer testimony tending to prove the terms of the guaranty and their breach. The burden would then have devolved upon respondents to prove that the Bank of Commerce was a holder in due course. At the last trial of the case, respondents did not rely upon the proposition that the Bank of Commerce, which had obtained a former judgment against respondents, was a holder in due course, and all the evidence of the defendant to sustain his defenses of failure of consideration and breach of guaranty was intro-

[1]Reported in 156 Pac. 406.

duced and heard by the jury. Upon the issues so presented to the jury, they found for the respondents against the appellant. That being the posture of affairs, appellant had his day in court, produced all his testimony, and is bound by the verdict.

It is contended, also, by appellant that the pleadings and evidence show a partnership between respondents and appellant, and that the partnership had never been dissolved nor had there been any accounting of any kind or character between them, and that, therefore, respondents have no right to sue and recover against appellant. The status of the parties was not that of a general partnership. Their status was that of persons engaged in a joint venture. A joint adventure is a commercial or maritime enterprise undertaken by several persons jointly; a limited partnership—not limited in the statutory sense as to the liability of the partners, but as to its scope and duration. Black's Law Dictionary (2d ed.); *Ross v. Willett*, 76 Hun 211, 27 N. Y. Supp. 785. These parties had engaged in the business of owning and managing a stallion, and no other business. There was no partnership existing between them except in the ownership of the horse. The horse was dead long before the suit was instituted, and the business of the joint adventure was ended. The principles applying to the law of general partnership and the authorities cited, therefore, do not apply here. 23 Cyc. 461. As was said in the former decision in this case:

" 'The right to contribution arises from the payment of more than one's share of a common liability, and rests upon an implied promise not declared on or made an issue in the suit of the creditor against the common debtors.' *Hoxie v. Farmers' & Mechanics' Nat. Bank*, 20 Tex. Civ. App. 462, 49 S. W. 637.

"The party from whom contribution is demanded must have been under a legal obligation to pay at the time the payment was made by those who demand the contribution." *Peterson v. Nichols*, 71 Wash. 656, 129 Pac. 373.

These requisites were shown by evidence in behalf of respondents at the trial, and were decided against the contention of appellant.

There is no error. Judgment affirmed.

MORRIS, C. J., MAIN, and PARKER, JJ., concur.

[No. 13010. Department One. March 28, 1916.]

G. W. BOLLEN, *Respondent*, v. WILSON CREEK UNION GRAIN & TRADING COMPANY, *Appellant*.[1]

CHATTEL MORTGAGES—FORECLOSURE—PARTIES DEFENDANT. In an action to foreclose a chattel mortgage on a crop of grain, one to whom it was sold and is theoretically in possession is a proper party.

SAME—ACTION FOR DESTRUCTION OF LIENS. A chattel mortgagee of a crop of grain may maintain an action in trover against one to whom the grain was sold and delivered and who put the mortgaged property beyond the reach of the mortgagee, he being liable in damages for destruction of the lien.

Appeal from a judgment of the superior court for Grant county, Steiner, J., entered January 6, 1915, upon findings in favor of the plaintiff, in an action to foreclose a chattel mortgage, tried to the court. Affirmed.

C. J. Lambert and *C. G. Jeffers*, for appellant.

W. E. Southard, for respondent.

CHADWICK, J.—Respondent brought this action to foreclose a chattel mortgage executed by one Charles E. Sroufe. The mortgage covered a crop of grain which was raised by Sroufe in the year 1912. The grain was delivered, after harvesting, to the appellant, who bought and paid for a part thereof. The trial judge found that the mortgage was a valid and subsisting lien of which the appellant had

[1]Reported in 156 Pac. 404.

actual and constructive notice. It is contended that the court's finding that respondent had given Sroufe permission to sell the grain, and had told appellant's manager that it might buy the grain, was not well founded. We are not prepared to say that this finding is not well sustained by the preponderance of the evidence.

The legal question, whether the respondent can maintain an action in the nature of a conversion is raised by appellant. It relies upon the case of *Silsby v. Aldridge*, 1 Wash. 117, 23 Pac. 836, wherein it is held that a chattel mortgage, unlike a chattel mortgage at common law and in many of the states, creates no more than a lien, and that proof of a mortgage would not sustain an allegation of ownership. Respondent is not suing as an owner, or as one having present title or right of possession. While denominating his action as one of foreclosure, the facts are set up showing the destruction of a valid lien upon the property, and resulting damages to the mortgagee. The action is, therefore, more in the nature of an action on the case than an action of foreclosure. *Randall v. Higbee*, 37 Mich. 40.

But, if we treat the action as one of foreclosure, appellant has done no more than bring in a party who, theoretically at least, has possession of the property, and has the burden of accounting for it. It is always proper, and in most instances necessary, in a foreclosure proceeding to make all who have or claim an interest in the property parties, that their rights, as against the mortgagee, may be determined. 27 Cyc. 1562; *California Safe Deposit & Trust Co. v. Cheney Elec. Light, Tel. & Power Co.*, 12 Wash. 138, 40 Pac. 732.

One who has put the mortgaged property beyond the reach of the mortgagee cannot complain that the mortgagee does not proceed against the property, or sue in trover. By his voluntary act, he has substituted his implied promise to pay such damages as the mortgagee may sustain, and is in

no position to determine for the mortgagee his choice of remedies.

The right to maintain an action for damages for the destruction of a lien has never been questioned in this court. The following cases recognize and support the governing principle. *Brotton v. Langert*, 1 Wash. 227, 23 Pac. 803; *Brown v. Union Sav. & Loan Ass'n*, 28 Wash. 657, 69 Pac. 383.

We find no error, and the judgment is affirmed.

MORRIS, C. J., MOUNT, and ELLIS, JJ., concur.

[No. 13110. Department One. March 28, 1916.]

JESSE CAIN, *Appellant*, v. REBECCA J. CAIN, *Respondent*.[1]

DIVORCE—ALIMONY—MODIFICATION—DISCRETION—REVIEW. The refusal to modify an award of alimony will not be disturbed on appeal unless abuse of discretion is clearly shown.

Appeal from an order of the superior court for King county, Dykeman, J., entered June 1, 1915, denying a petition to modify a decree of divorce. Affirmed.

H. E. Foster, for appellant.

Vince H. Faben, for respondent.

CHADWICK, J.—The parties to this proceeding were divorced May 16, 1914. The custody of their infant child was given to the mother. Certain real property and an award of $25 per month was granted as alimony. Appellant brought this action asking for a modification of the decree to the extent that he be not required to make further payments of alimony, and that he be given the custody of the child. He alleges that the original allowance of alimony was excessive; that the wife is now earning $42 per month

[1]Reported in 156 Pac. 403.

as telephone operator; that of the $25 payment, she only devotes a small share to the care of the child; that the wife has not a good disposition and seems not to care for the child; that the maternal grandparents, in whose care the child now is by the direction of the wife, "will, in all respects, furnish the child a good home," but that it is not convenient for him to visit the child more often than once a week at its present abode.

Resorting to appellant's petition, it would seem that respondent has an income, including the alimony, of $67 a month with which to maintain herself and child, and that the child is being well cared for by its maternal grandparents.

For obvious reasons, the appellate court will not modify a decree of this character unless there has clearly been an abuse of discretion on the part of the trial court. *McCord v. McCord*, 24 Wash. 529, 64 Pac. 748; *Chappell v. Chappell*, 45 Wash. 652, 89 Pac. 166; *State ex rel. Clark v. Superior Court*, *ante* p. 80, 155 Pac. 398.

Affirmed.

MORRIS, C. J., MOUNT, ELLIS, and FULLERTON, JJ., concur.

[No. 13128. Department One. March 28, 1916.]

F. H. BARDSHAR, *Appellant*, v. STEPHEN E. CHAFFEE, *Respondent*.[1]

BILLS AND NOTES—LIABILITY OF INDORSER. Under Rem. & Bal. Code, § 3457, an indorsement in blank implies a promise to pay the note according to its purport, but only upon demand and notice.

SAME—INDORSEMENT—LIABILITY—NOTICE OF DISHONOR. An option in a mortgage note to declare the whole sum due upon default in payment of interest does not dispense with the necessity for presentment and demand upon the maker and notice of dishonor in order to hold an indorser; and the fact that the maker had defaulted in interest at the time it was negotiated is immaterial and does not make it demand paper.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered August 3, 1915, upon sustaining a demurrer to the complaint, dismissing an action on a promissory note and to foreclose a mortgage. Affirmed.

Willett & Oleson, for appellant.

V. O. Nichoson and *Stephen E. Chaffee*, for respondent.

ELLIS, J.—Action upon a promissory note and to foreclose a mortgage securing it. The plaintiff alleges, in substance, that the note was payable four years after date, bore interest from date to maturity at eight per cent per annum, payable annually in advance, and provided that, in case of default in payment of any interest, the principal, at the option of the holder, should become due and payable without notice, and that it was sold, indorsed in blank and delivered by the payee to the plaintiff when the first two annual installments of interest were due and unpaid. There is no allegation of any indorsement on the note indicating that any interest had been paid, nor that there was any representation by the indorser to that effect. The plaintiff, however, alleges that he did not know that there had been a de-

[1]Reported in 156 Pac. 388.

fault in payment of interest until long after a reasonable time to demand payment and, by notice of nonpayment, to hold the indorser. The action was brought more than four years after the making of the note and when it was long past due on its face, in any event. There was no presentment, protest or notice of nonpayment to the indorser.

The makers defaulted and judgment was entered against them. The indorser demurrer to the complaint. The demurrer was sustained. Plaintiff abiding by his pleading, the indorser was granted a dismissal with prejudice. Plaintiff appeals.

Briefly, appellant's position is that, because the note at the option of the holder could have been declared due without notice, and because the first year's interest was not paid in advance when the note was made, the note was demand paper at its inception and was overdue when indorsed; that therefore the indorser was not entitled to notice of nonpayment. The conclusion does not follow from the premises. The action, so far as the indorser is concerned, is on the contract implied by law from his indorsement in blank. That contract is an implied promise to pay the note *according to its purport upon demand and notice.* 1 Daniel, Negotiable Instruments (5th ed.), § 669a; Rem. & Bal. Code, § 3457 (P. C. 357 § 131). The purport of the note is that the maker will pay the principal at the specified due time four years from date, and the interest annually in advance, and upon his failure to pay any interest when due, he will, upon demand, pay both principal and accrued interest. The fact that the maker had defaulted in the interest when the note was negotiated is immaterial. The indorser did not warrant that any interest was paid. He expressly warranted nothing, nor is it alleged that he actively concealed anything. In the absence of such warranty or concealment, the note spoke for itself. It was what it purported to be. The indorser can only be held upon his implied promise to pay. The law conditions that promise upon demand and notice within a reason-

able time. These were not alleged. The complaint, therefore, stated no cause of action against the indorser.

Industrious counsel have failed to cite any authority to the effect that a provision in a note giving the holder the option to declare the whole sum due upon default in payment of interest dispenses with the necessity for presentment and demand upon the maker, and notice of dishonor in order to hold the indorser. This court has held to the contrary. *Galbraith v. Shepard*, 43 Wash. 698, 86 Pac. 1113. Neither have counsel cited any authority to sustain their claim that the indorsee of demand paper, or paper overdue, is relieved from the necessity of demand and notice of dishonor in order to hold the indorser. The authorities are to the contrary. 1 Daniel, Negotiable Instruments (5th ed.), § 611; *Beer v. Clifton*, 98 Cal. 323, 33 Pac. 204, 35 Am. St. 172, 20 L. R. A. 580; *Ecfert v. Des Coudres & Co.*, 1 Mill. (S. C.) 69, 12 Am. Dec. 609; *Rosson v. Carroll*, 90 Tenn. 90, 16 S. W. 66, 12 L. R. A. 727.

Judgment affirmed.

MORRIS, C. J., MOUNT, and CHADWICK, JJ., concur.

[No. 13260. *En Banc.* March 28, 1916.]

THE STATE OF WASHINGTON, *on the Relation of the Board of Tax Commissioners, Appellant,* v. JAMES J. CAMERON, *Respondent.*[1]

TAXATION—UNIFORMITY—ASSESSMENTS—VALUATION — STATUTES — CONSTITUTIONAL PROVISIONS. The assessment of property for taxation at fifty per cent of its value, as required by 3 Rem. & Bal. Code, § 9112, does not violate the constitutional provisions (Const., art. 7, § 1, and Id., § 2, as modified by the third amendment) requiring all property to be taxed in proportion to its value, and requiring the legislature to provide by law a uniform and equal rate of assessment and taxation on all property according to its value in money so that every one shall pay a tax in proportion to the value of his or her property; since the fundamental idea is equality and uniformity and the constitution is complied with by assessment of all property at a uniform rate.

SAME—UNIFORMITY—ASSESSMENTS—VALUATION—EXEMPTIONS. The proviso to such amendment to the constitution authorizing the legislature to exempt personal property to the amount of $300 for each head of a family liable to assessment and taxation permits a deduction only of personal property to the actual value of the amount of the exemption and not an exemption of $300 from the value placed on the property for the purpose of assessment.

SAME—STATUTES—PARTIAL INVALIDITY. Such proviso, if construed as allowing a reduction of $300 from the valuation placed on the property for the purposes of assessment, may be rejected as repugnant to the constitution without affecting the validity of the balance of the act, as the same is complete in itself; and leads to the conclusion that the proper procedure in making the deduction is to exempt property of the actual value of $300.

SAME — ASSESSMENT—EXEMPTIONS—VALUATIONS—POWER OF STATE TAX COMMISSIONERS. The board of state tax commissioners has power to order the county assessors, in allowing exemptions to the head of a family, to deduct property of the actual value of $300, rather than to deduct $300 from the value placed on the property for the purpose of assessment; in view of Rem. & Bal. Code, § 9098, giving the board power to exercise general supervision over the system of taxation throughout the state and to exercise supervision

[1]Reported in 156 Pac. 537.

over assessors and county boards of equalization, to the end that all taxable property shall be placed upon the assessment rolls and equalized as between the different counties, etc.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered November 24, 1915, upon sustaining a demurrer to the petition, dismissing an action for a writ of mandamus to compel obedience to an order of the board of state tax commissioners. Reversed.

The Attorney General and *Edward W. Allen, Assistant*, for appellant.

F. G. Remann, Harry E. Phelps, and *A. B. Bell* (*Louis F. Hart*, of counsel), for respondent.

John B. White and *William C. Meyer, amici curiae.*

FULLERTON, J.—This is an appeal from a judgment of dismissal entered in a proceeding in mandamus instituted by the state board of tax commissioners against the county assessor of Pierce county to compel that officer to obey an order promulgated by the board relative to the manner of making exemptions when assessing personal property for the purpose of taxation.

In the petition for the writ, it is alleged that, for many years past, it has been the practice of county assessors, when assessing property for the purpose of taxation, to take some ratio of value less than the true market value, and assess all property according to such ratio; that in allowing the exemption of three hundred dollars to heads of families, authorized by the constitution and the statutes of the state, the practice of the assessors varies in the different counties; that in some of the counties the true cash value of the personal property is ascertained, the amount of the exemption deducted, and the remainder assessed at the ratio prevailing in the particular county, while in others the property is first valued at the prevailing ratio, the amount of the exemption deducted, and the remainder returned as subject to assess-

ment; that this practice prevailed when the laws required all property to be assessed at its true and fair value in money, and prevails now, when the law provides that property shall be assessed at not to exceed fifty per centum of its true and fair value in money. It is further alleged that this varying mode of assessing property results in inequalities in valuations for assessment purposes, and, to correct the evil, the board of state tax commissioners duly made and promulgated an order, causing it to be served upon all of the county assessors of the state, including the respondent, wherein they directed such assessors, in making exemptions, to pursue the method first indicated, that is, to first ascertain the true cash value in money of the personal property of the person entitled to the exemption, deduct the amount of the exemption therefrom, and assess the remainder of the property at the ratio prevailing in the particular county. It is then alleged that the respondent had announced his intent to refuse to comply with the order, and had announced his intent to assess the property in his county in accordance with the second method before set forth. Further matters are then alleged tending to show that the method adopted by the respondent will exempt from taxation personal property not permitted to be exempted by the fundamental law.

A demurrer to the petition was interposed by the respondent, which the trial court sustained, and after the relator had refused to plead further, a judgment of dismissal was entered, from which this appeal is prosecuted.

Section 1 of art. 7 of the constitution provides:

"All property in the state not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. . . ."

Section 2 of the same article, as modified by the third amendment, provides:

"The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the

state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property: Provided, That a deduction of debts from credits may be authorized: Provided further, That the property of the United States, and of the state, counties, school districts, and other municipal corporations, and such other property as the legislature may by general laws provide, shall be exempt from taxation; and provided further, That the legislature shall have power, by appropriate legislation, to exempt personal property to the amount of $300 for each head of a family liable to assessment and taxation under the provisions of the laws of this state of which the individual is the actual *bona fide* owner."

Prior to the enactment of 1913, the various statutes enacted pursuant to the constitutional provisions cited required all property to be assessed at its true and fair value in money. Rules for determining the true and fair value were also prescribed, such, for example, as that the assessor shall not adopt as a criterion of value the price for which the property will sell at auction, or forced sale, or in the aggregate with all the property in the town or district, but at such sum or price as he believes the property to be worth in money; and further, that the cash value of property shall be that value at which it would be taken in payment of a just debt from a solvent debtor. The statute relating to exemptions then provided for an exemption to each head of a family personal property to the amount of three hundred dollars.

At the legislative session of 1913 (Laws 1913, p. 438, §1; 3 Rem. & Bal. Code, § 9112), that part of the section of the statute relating to the value at which property shall be assessed was amended so as to read, "all property shall be assessed at not to exceed fifty per cent of its true and fair value in money"; although the rules for ascertaining the true cash value were retained. At the same session of the legislature, the section of the statute relating to exemptions

was also amended, the part thereof relating to the present inquiry being made to read as follows:

"All property described in this section, to the extent herein limited, shall be exempt from taxation, that is to say: . . . Seventh. The personal property of each head of a family or widow liable to assessment and taxation of which such individual is the actual and bona fide owner to an amount of three hundred dollars; Provided, That each person shall list all of his personal property for taxation and the county assessor shall deduct the amount of the exemption authorized by this section from the total amount of the assessment and assess the remainder." Laws 1913, p. 351, § 1, subd. 7 (3 Rem. & Bal. Code, § 9098).

The state board of tax commissioners was created by the legislature of 1905.[1] It was given power and it was made its duty, among other things, to have and exercise general supervision of the system of taxation throughout the state; to exercise general supervision over assessors and county boards of equalization and the determination and assessment of the taxable property in the several counties, cities and towns of the state, to the end that all taxable property in the state shall be placed upon the assessment rolls and equalized between persons, corporations and companies in the several counties of the state and between the different municipalities and counties therein, so that equality of taxation shall be secured according to the provisions of law; to confer with, advise and direct assessors, boards of equalization and county commissioners as to their duties under the law; to prescribe all form books and blanks to be used in the assessment and collection of taxes; to visit the counties of the state and ascertain where existing laws are improperly or negligently administered; to hold meetings in any part of the state for the purpose of investigating matters with which it is charged to supervise, with power to summon witnesses and compel them to testify at such investigation; and finally, by the statute

[1]NOTE: See Rem. & Bal. Code, § 9085.—REP.

as first enacted, the members of the board were made members of the state board of equalization, which board was given power, in the equalization of state taxes, to raise or lower the assessed valuation placed upon any class of property in any county, so as to make such valuation "equal and uniform, so far as possible, in every part of the state, for the purpose of ascertaining the just amount of tax due from each county for state purposes."

From the foregoing quotations from the constitution, it is made clear, we think, that property need not be assessed at its actual value in money in order to comply with the mandate contained therein. The fundamental idea is equality and uniformity in the rate of assessment, and property may be assessed at an equal and uniform rate, although assessed at some percentage of its value less than its full or actual value. It seems clear to our minds, also, that the exemption provided for in the last proviso to the section quoted (the third amendment to the constitution) permits a deduction only of personal property to the actual value of the amount of the exemption, not an exemption of $300 from the value placed on the property for the purpose of assessment.

Nor do the statutes, when properly construed, conflict with any of these provisions of the constitution. Since the constitutional mandates are aimed at unequal rates, they are complied with when all property within the taxing district is placed on the assessment roll and assessed at the same percentage of value, although the value fixed may be less than the full value of the property, and although the rate of percentage may not be the same in all of the taxing districts. So it follows that, even if the requirement of the statute that all property shall be assessed at not to exceed fifty per centum of its true and fair value in money be construed to permit each taxing district to choose its own percentage of value less than the maximum fixed, it cannot be said to violate the rule of uniformity and equality, in so far as the particular taxing districts are concerned.

With regard to the district composed of the state at large, the effect of varying valuations is, of course, important, and were the state compelled to adopt these valuations as a basis for the levy for state purposes, state taxation would of necessity be unequal and ununiform. But the state, as the citations we have made to the statutes show, does not rely upon these valuations in levying taxes for its own purposes. It has created the state board of tax commissioners and the state board of equalization, and given the one power to ascertain the extent of these differences, and the other power for state taxation to raise or lower the valuation of any class of property in any county to a value that will make valuations equal and uniform in every part of the state. The final result, therefore, is equality and uniformity in valuation in each particular taxing district, although the percentage of value when measured by the true value may be different in each.

So with the statute providing for the exemption. It will be observed that the statute follows the constitutional mandate in the part preceding the proviso, in that it provides for the exemption of personal property to the amount limited in the constitution, not that all such property shall be assessed at the ratio adopted by the county assessor and the sum of three hundred dollars deducted from the amount of the assessment. The authority for this latter idea is found, if found at all in the statute, in the language of the proviso alone. The language used therein is, it must be confessed, somewhat confusing. Each person is required to list all of his personal property for taxation, and the assessor is required to deduct the amount of the exemptions from the total amount of the assessment and assess the remainder. The confusion arises from the use of the word "assessment." Being prefixed by the article "the," it seemingly refers to something that has been previously stated, but it has no antecedent in any preceding word or phrase unless it be the phrase "list of personal property," which the person is required to furnish the assessor. Construing the word to refer to the

"list" furnished by the owner, the act is within the constitutional mandate, as the requirement then is that the assessor shall deduct actual values to the amount of the exemption and assess the remainder. But, if it is construed to mean that the assessor must first assess all of the property listed at the ratio at which he assesses all personal property and then deduct from the amount thereof $300, it violates the mandate of the constitution, since it authorizes a greater exemption than the amount permitted by that instrument in all instances where such property is not assessed at its actual value.

But if it be said that the proviso will bear no other construction than that last suggested, then we answer that it must be rejected as in violation of the constitution. This can be done without subjecting the remainder of the section to the penalty of unconstitutionality. A proviso repugnant to the enacting part of a statute is void, but it will not avoid the entire act unless it is so closely connected with its subject-matter as to lead to the conclusion that the legislature would not have passed the one without the other. *Nathan v. Spokane County*, 35 Wash. 26, 76 Pac. 521, 102 Am. St. 885, 65 L. R. A. 336; *Shook v. Sexton*, 37 Wash. 509, 79 Pac. 1093. But if it be said that the so-named proviso is not strictly speaking a proviso, but in the nature of an independent clause, the same rule will prevail. An act may be in part beyond legislative authority, and within it for the residue, but if the act is capable of being administered in the parts which are within the power of the legislature to enact, it will be so far valid; unless, of course, the parts are so intimately connected that it cannot be presumed that the legislature would not have enacted the one without the other. *State ex rel. Lindsey v. Derbyshire*, 79 Wash. 227, 140 Pac. 540. In the present instance, the proviso can be rejected and still leave an act complete in itself and capable of enforcement. The legislative intent to exempt property to the value of $300 is clear, and the proviso does no more than suggest a mode of carrying the intent into effect. Since the mode leads to an

unconstitutional result, it can be rejected for some other mode within the power of the taxing officers to provide.

These considerations lead to the conclusion that the method pursued by the respondent in making deductions of exemptions is in violation of both the constitution and statute, and that the proper procedure is indicated in the order of the state board of tax commissioners.

The remaining inquiry is whether that board has power to make such an order. On this question we think the statute leaves no room for doubt. The board is not only given power to exercise general supervision over the system of taxation throughout the state, but to exercise supervision over assessors and county boards of equalization, to the end that all taxable property shall be placed upon the assessment rolls and equalized as between the different counties and municipalities, so that equality of taxation shall be secured according to the provision of law. As we held in *Great Northern R. Co. v. Snohomish County*, 48 Wash. 478, 93 Pac. 924, the power to supervise the work of another means something more than merely to act in an advisory capacity only; that it means power to oversee, inspect and superintend the work of that other, which of necessity includes the power to promulgate general orders for his guidance.

It is our conclusion that the trial court erred in sustaining the demurrer to the petition. The judgment is therefore reversed, and the cause remanded with instructions to overrule the demurrer and proceed to a hearing upon the merits.

MORRIS, C. J., MOUNT, MAIN, HOLCOMB, PARKER, ELLIS, and CHADWICK, JJ., concur.

[No. 13049. Department One. March 29, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v. SEATTLE TAXICAB & TRANSFER COMPANY, *Appellant*.[1]

STATUTES—SUBJECTS AND TITLES. The provision in the jitney bus act, Laws 1915, p. 227, requiring certain carriers to give a surety bond before engaging in business, is germane to and sufficiently included within the title "an act relating to and regulating common carriers of passengers upon public streets, roads and highways."

CONSTITUTIONAL LAW—CLASS LEGISLATION—EQUAL PROTECTION OF THE LAWS. The jitney bus act, Laws 1915, p. 227, does not violate Const., art. 2, § 19, prohibiting class legislation or the denial of the equal protection of the laws, in that motor carriers of passengers for hire on the public streets in cities of the first class are required to give a surety bond before engaging in business, while none is required of street cars; as the regulation is a reasonable exercise of the police power.

CARRIERS—MOTOR VEHICLES—REGULATION—BONDS. Such act is not unconstitutional as requiring a surety bond without provision for substitutes of any kind, where it was not shown that there were no such companies authorized to do business in the state; the presumption being that such bonds are obtainable, and the court cannot know judicially that the requirement is unreasonable.

SAME. The fact that such bonds were denied to those who were financially irresponsible does not show that the act was unreasonable or unconstitutional as prohibitive.

CONSTITUTIONAL LAW—CLASS LEGISLATION. The fact that carriers of the United States mails are exempted from the provision of the act does not render it void.

SAME—FEDERAL LIMITATIONS—APPLICATION. The act is not unconstitutional as invading the 4th and 5th amendments to the constitution of the United States, as they are limitations on the powers of the Federal government and have no application to state laws.

SAME—CRIMINAL LAW — SELF-INCRIMINATION — IMPRISONMENT FOR DEBT. The act is not unconstitutional as violating Const., art. 1, §§ 9 and 17, providing that no person shall be compelled in any criminal case to be a witness against himself, and that there shall be no imprisonment for debt.

SAME—DUE PROCESS OF LAW. The act does not violate the due process clauses of the state and Federal constitutions.

[1]Reported in 156 Pac. 837.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered May 5, 1915, upon a trial and conviction of violating an act relating to the regulation of common carriers of passengers. Affirmed.

William Hickman Moore, Hugh Todd, Bogle, Graves, Merritt & Bogle, and *Brightman, Halverstadt & Clarke,* for appellant.

Alfred H. Lundin, W. F. Meier, and *Joseph A. Barto,* for respondent.

C. J. France, Shorett, McLaren & Shorett, James E. Bradford, and *William B. Allison, amici curiae.*

FULLERTON, J.—The legislature of the state of Washington, at its biennial session of 1915, passed an act relating to common carriers of passengers, the title and body of which reads as follows:

"An act relating to and regulating common carriers of passengers upon public streets, roads and highways, providing for the issuance of permits; prescribing penalties for violations, and providing when this act shall take effect.

"Be it enacted by the Legislature of the State of Washington:

"Section 1. It shall be unlawful for any person, firm or corporation, other than a steam, street or interurban railway company, to engage in or to carry on the business of carrying or transporting passengers for hire in any motor propelled vehicle along any public street, road or highway, within the corporate limits of any city of the first class, without having first obtained a permit so to do as hereinafter provided: Provided, That any street or interurban railway or other transportation company engaging in the business of transporting passengers for hire in any motor propelled vehicle except street cars along any public street, road or highway in this state, shall come under the provisions of this act: Provided, further, That the provisions of this act shall not apply to carriers of U. S. Mail.

"Sec. 2. Every person, firm or corporation other than a steam, street or interurban railway company, desiring to en-

gage in the business of carrying or transporting passengers for hire in any motor propelled vehicle over or along any public street, road or highway in any city of the first class and every street or interurban railway or other transportation company desiring to engage in the business of transporting passengers for hire in any motor propelled vehicle except street cars, shall apply to the secretary of state for a permit so to do, and such applicant for each motor vehicle intended to be so operated shall deposit and keep on file with the secretary of state a bond running to the State of Washington in the penal sum of twenty-five hundred dollars, with good and sufficient surety company licensed to do business in this state as surety to be approved by the secretary of state, conditioned for the faithful compliance by the principal of said bond with the provisions of this act and to pay all damages which may be sustained by any person injured by reason of any careless, negligent or unlawful act on the part of said principal, his agents or employes in the conduct of said business or in the operation of any motor propelled vehicle used in transporting passengers for hire over or along any public street, road or highway, and shall pay to the secretary of state a fee of five dollars and thereupon such license shall be issued to the applicant.

"Sec. 3. Every person injured by any careless, negligent or unlawful act of any person, firm or corporation receiving a permit under the provisions of this act, or his, their, or its agents, or employes in conducting or carrying on said business or in operating any motor propelled vehicle used for the carrying and transporting of passengers over and along any public street, road or highway, and his heirs, executors and administrators shall have a cause of action against the principal and surety upon the bond provided for in the preceding section for all damages sustained and in any such action the full amount of damages sustained may be recovered against the principal, but the recovery against the surety shall be limited to the amount of the bond and a surviving husband and child or children or if no husband, then the child or children shall have action for the death of the wife or mother caused by any such negligence.

"Sec. 4. Every person, firm or corporation, other than a steam, street or interurban railway company, engaging in the business of carrying or transporting any passengers for

hire in any motor propelled vehicle along or over any public street, road or highway or carrying or transporting any passengers for hire along or over any public street, road or highway in any city of the first class, and every street or interurban railway or transportation company engaging in the business of transporting passengers for hire in any motor propelled vehicle except street cars, without having first obtained and having a permit so to do as in this act provided shall be guilty of a gross misdemeanor.

"Sec. 5. If any part of this act be held invalid by any court, the remainder of this act shall nevertheless be valid.

"Sec. 6. This act is necessary for the immediate preservation of the public safety, and shall take effect April 10th, 1915." Laws 1915, p. 227, ch. 57.

On April 27, 1915, the prosecuting attorney of King county filed an information in the superior court of that county charging the Seattle Taxicab & Transfer Company, a corporation, with a violation of the act. The company, on appearing in answer to process served upon it, did not contest the charge that it had operated its taxicabs without a compliance with the provisions of the act, but rested its defense on the ground that the act itself was void and of no effect, because in contravention of the constitution of the United States as well as the constitution of the state of Washington. At the conclusion of the trial, the company was adjudged guilty by the trial court, and sentenced to pay a fine as for a gross misdemeanor. From the judgment and sentence, this appeal is prosecuted.

In this court, likewise, constitutional questions only are presented. The act is assailed by counsel specially representing the appellant as violative of § 19 of art. 2, §§ 1 and 12 of art. 1, of the state constitution, and § 1 of art. 14, of the amendments to the constitution of the United States. We have been favored also with briefs of counsel representing other interests, and these, in addition, assail the act as violative of §§ 7, 9 and 17 of art. 1, of the state constitution, and the fourth and fifth amendments to the Federal constitu-

tion. These objections we shall notice in order, taking up first those founded upon the state constitution.

Section 19 of art. 2 of the state constitution provides that, "No bill shall embrace more than one subject, and that shall be expressed in the title." The claim of unconstitutionality on this branch of the question is founded on the concluding clause of this provision, the particular contention being that the title of the act does not express its subject-matter. The appellant points out that the only operative words of the title of the act which can be said to denote its contents are found in the first clause thereof, that is, in the words, "an act relating to and regulating common carriers of passengers upon public streets, roads and highways," and these, it argues, give no hint that a bond is to be required from a certain class of common carriers before they will be permitted to engage in the business of carrying passengers.

But it is our opinion that the title is sufficient. How full the title of an act must be in order to express its subject has frequently been a question for the consideration of this court. We have frequently held that the title to an act to be sufficient need not be an index to the body of the act; that it is sufficient if it is suggestive of the general subject treated; that the generality of a title is no objection to it, so long as it is not made a cover to legislation incongruous in itself; and that, under a general subject, may be included innumerable minor subjects, if these minor subjects relate to the general subject expressed and form a comprehensive whole. More specifically, we have held that the title, "an act relating to pleadings in civil actions," was sufficiently definite, not only to permit the enactment of specific provisions relating to the subject of pleadings, but also to permit the repeal of certain existing sections of the statute on the same subject; *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520. In *State v. Fraternal Knights and Ladies*, 35 Wash. 338, 77 Pac. 500, we held that, under the title, "an act regulating fraternal beneficiary societies, orders, or associations," certain enumerated bene-

ficiary insurance societies could be prohibited from doing business in this state unless their mortuary assessment rates equaled or exceeded a certain minimum named in the statute. In *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735, an ordinance requiring one desiring to engage in the business of a pawnbroker to procure a license was held valid although enacted under the title, "an ordinance to license and regulate certain trades and occupations in the city of Seattle." In *Ewing v. Seattle*, 55 Wash. 229, 104 Pac. 259, the title of the act was, "an act relating to electric railroads, street and other electric railways, . . .," and was held sufficiently broad to embrace a provision providing for the granting of franchises for such railways by the legislative authority of a city. And see, also, *State ex rel. Puget Mill Co. v. Superior Court*, 68 Wash. 425, 123 Pac. 791; *Cudihee v. Phelps*, 76 Wash. 314, 136 Pac. 367; *State ex rel. Jones v. Clausen*, 78 Wash. 103, 138 Pac. 653. The principle of these cases clearly support the title to the act in question. Unquestionably the subject-matter of the act is the regulation of common carriers of passengers, and the requirement that certain classes of such carriers shall give a bond to cover losses caused by negligence in the exercise of the business is not so far foreign to the general subject as not to be embraced in a title which refers only to the general subject.

It is next contended that the statute violates § 19, art. 2 of the constitution, which prohibits the legislature from passing laws granting to one citizen or class of citizens privileges and immunities which are not granted to all alike, and hence is discriminatory as it denies to him the equal protection of the laws. The appellant's learned counsel do not contend, of course, that the legislature may not classify the subjects of legislation and enact laws applicable to one class not applicable to another, nor do they contend, as we understand them, that the legislature may not divide general classes into sub-classes, where there is a just and reasonable ground

for a distinction, and enact laws applicable to one sub-class not made applicable to another. But if this latter division be thought not tenable, a brief consideration will show its fallacy. Take, for comparison, the case of a steam railway hauling passengers for hire between two given points, and the case of a stagecoach company doing the same thing between the same points. Both are common carriers of passengers, and both are subject to legislative regulation as such. The statute books are full of instances where regulations have been made applicable to the one and not to the other, which have been upheld by the courts, yet no case, in so far as we are advised, has ever yet held such a regulation invalid because the particular regulation applied to the one and not to the other. An apt illustration of the principle is found in the case of *Pacific Express Co. v. Seibert*, 142 U. S. 339. The issue there was the validity of the act of the Missouri legislature imposing a tax on all express companies carrying on the business of transportation for hire on railroads and steamboats, but exempting all other concerns carrying on the same business which owned its own means of transportation. The act was attacked on the ground that it was an attempt to subdivide classes, but the court upheld the classification, saying there was a vital distinction between express companies defined in the act and those concerns exempted from the tax, in that railroads and steamboat companies paid taxes upon the means of carriage and their other tangible property, while express companies of the kind defined had no tangible property of consequence, and that the act was a just discrimination in order that the burdens of government might be equally borne. Another illustration is found in the case of *Texas Co. v. Stephens*, 100 Tex. 628, 103 S. W. 481, where the court said:

"Persons, who in the most general sense, may be regarded as pursuing the same occupation, as for instance merchants, may thus be divided into classes and the classes may be taxed in different amounts and according to different standards.

Merchants may be divided into wholesalers and retailers, and, if there be reasonable grounds, these may be further divided according to the particular classes of business in which they may engage."

Illustrations of the same principle are found in our own reports, although perhaps the precise question was not discussed in any of them. Such a classification was made in the Laws of 1911, p. 131 (3 Rem. & Bal. Code, § 6580-a), which prohibits the employment of women for more than eight hours during any day in any mechanical or mercantile establishment, except in curing or canning perishable fruit, vegetable or fish, upheld in *State v. Somerville*, 67 Wash. 638, 122 Pac. 324. So the workmen's compensation act, classifying the various occupations of the state into hazardous and nonhazardous occupations, upheld in *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; the statute of 1907, p. 436, regulating fishing for salmon, upheld in *State v. Tice*, 69 Wash. 403, 125 Pac. 168, 41 L. R. A. (N. S.) 469; and the statute permitting certain business occupations to be conducted on Sunday and prohibiting the conducting of others, upheld in *State v. Nichols*, 28 Wash. 628, 69 Pac. 372. Other instances can be cited, but these are sufficient to show that classification of general classes for the purposes of legislation is upheld whenever there is between them any reasonable distinction on which classification can be based.

But the appellant's principal contention is that the classification here made is not based upon any just difference between the character of the carrier made subject to the regulation of the statute and those exempt from its provisions. A reference to the first section of the act will show that the regulation is made applicable to any person, firm or corporation engaged in carrying passengers for hire along any public street, road or highway in cities of the first class of the state in any motor propelled vehicle, other than street cars and vehicles carrying the United States mail. It will be ob-

served, also, by a reference to the second section, that the act does little if any more than require the operation of such vehicles to provide for a solvent fund out of which persons injured by the negligent operation of the vehicles may recover for the injuries suffered from their negligent operation. The question then is, Is there any just ground for this distinction? In our opinion, the question must be answered affirmatively. A street car company, as is well known, must operate its carriers upon fixed tracks. The carriers also must be large and heavy, requiring, whether steam, gasoline or electrically propelled, powerful although delicate and costly machinery. Such a company, therefore, before it can begin operations at all, must expend large sums of money in the procurement of visible and tangible property which can be made subject to its obligations. Experience has taught them, moreover, that however careful it may be in the selection of its necessary employees, or however rigid may be its rules governing their conduct, accidents will happen, either to its passengers or to persons using the streets upon which it operates, for which it must respond in damages. Losses of this character it recognizes and makes the same preparation to meet as it does to meet other fixed charges upon its revenues. It is not so with the other motor propelled vehicles as we now know them. They require no fixed tracks which must be put in at the expense of the operator, as they run upon highways constructed and kept in order by the public. No considerable amount need be invested in visible or tangible property before operations are begun. Indeed the vehicle itself may represent the entire capital of its operator, and this may be destroyed or rendered valueless in the very accident which would give rise to a liability. But without attempting to point out other differences, it is plain that the one, from the necessities of the case, must have a visible fund from which persons negligently injured by its operation may recoup his losses, while the other need not have such a fund, and this

difference we think justifies legislation requiring a bond of indemnity from the one not required of the other.

The question was before the court of criminal appeals of Texas, *Ex parte Sullivan* (Tex. Cr.), 178 S. W. 537, where it was considered at some length. In the course of the opinion, the court said:

"We have had much difficulty in reaching a correct and satisfactory conclusion as to whether or not requiring the jitney operators to procure such bond, and not the other classes of common carriers of passengers for hire in the city, is so unreasonable or such a discrimination as to make this feature of the ordinance void. From our study of the facts and the law applicable, we think it reasonably certain that the record shows three separate and distinct classes of common carriers of passengers for hire in said city (outside of the steam and interurban railways not under consideration), to wit: First, the street car; second, the ordinary hack and automobile; and, third, the jitney. Clearly, the city so regarded them and acted upon such distinction. . . .

"In our opinion the agreed facts in this case show such a marked distinction between the three characters of passenger carriers for hire and the extent and manner of their use of the streets as to justify the city in requiring the operator of the jitney to give such bond and in not requiring either of the other classes of carriers to do so, and that we cannot therefore hold this provision of the ordinance void."

In *Ex parte Cardinal* (Cal.), 150 Pac. 348, and *Ex parte Counts* (Nev.), 153 Pac. 93, the power of a municipality to require, by ordinance, operators of motor propelled vehicles carrying passengers to execute a bond for the purposes required in the statute before us was upheld in well considered opinions. The precise question now before us was not discussed in these latter cases, but since the ordinances made the same distinction between the vehicles regulated and street cars, the question was necessarily decided, and doubtless would have been discussed if thought to be of particular moment. In the case from California, this language was used:

"We see no reason to doubt the power of the state, or any county or municipality, in the exercise of its police power

of regulation, to require security in the shape of a bond or insurance policy from its licensees in all cases where the giving of such security may fairly be held to be a reasonable requirement for the protection of the public. If the power to do this exists, we are satisfied that it cannot properly be held by the courts that the requirement of such security by the ordinance before us was an unreasonable exercise of its power by the board of supervisors of San Francisco. . . .

"In the case at bar we have persons undertaking to pursue upon the public streets of the city and county of San Francisco an occupation that if negligently conducted is fraught with danger not only to those who may be passengers, but also to the public generally upon those streets. The occupation is one that may properly be regulated by the public authorities, and the insistence on a bond or other security in a reasonable amount to indemnify those who may be injured by the negligent or illegal operation of the business appears to us not to be beyond the range of reasonable requirement."

Our own case of *State ex rel. Case v. Howell*, 85 Wash. 294, 147 Pac. 1159, sustains the general power. That was a case brought to test the emergency feature of the act, and while the court took care to say that the question of the validity of the act as a whole was not before us and could not be raised in that form of proceeding, it was said that the act was a form of regulation, and that reasonable regulation of carriers of this kind was so clearly within the police power of the state that the citation of authorities to support the proposition was not necessary.

It is further contended in this connection that the act is invalid because of the particular character of the bond required. The requirement is, it will be noticed, that the bond be obtained from a "good and sufficient surety company licensed to do business in this state," making no provision for substitutes in any form, or for bonds with other sureties of equal responsibility. But we know of no constitutional right which such a provision violates. The power to regulate necessarily implies the power to prescribe the form of regula-

tion, and the most that can be successfully contended for, conceding even that it was without the power of the legislature to actually prohibit this form of traffic, is that the requirement be a reasonable one. It is not shown that there were no such companies authorized to do business in this state, and since the legislature prescribed this form of bond, the court must presume that they had knowledge of the subject-matter upon which it legislated, and must presume, in consequence, that there are such companies and that bonds are obtainable from them without undue restrictions or unreasonable cost. We cannot, therefore, know judicially that the requirement is unreasonable.

But it is urged that there are facts in the record which show that bonds of the character prescribed by the act cannot be procured from the surety companies, and that the act, while not ostensibly so, is actually prohibitive. But the evidence as we read it does not justify this contention. It undoubtedly shows that many applicants for such bonds who were unable to show that they had sufficient financial ability to meet the losses they were liable to occasion were refused bonds, but it shows, on the other hand, that those who were so financially able had no difficulty in procuring them. As to those who were denied bonds, the act may be prohibitive, but this does not argue against its constitutionality. It in no manner proves that the regulation is unreasonable. Highways are constructed primarily as a convenient passageway for all of the people, and no one has an absolute right to use them for his own private gain, even though such use be to carry over them people who desire the service. Where all have rights occasions will arise where there must of necessity be regulation. The operation of motor propelled vehicles on congested streets is fraught with danger. It is common knowledge that numerous accidents, some of them fatal in their consequences, are a result of such operation, and, plainly, it is not an unreasonable regulation to require that those who engage therein provide a fund out of which

innocent users of the streets who suffer losses caused by the negligent operation of the vehicles can be remunerated in some degree.

Provisions restricting the character of surety that may be furnished, when surety is required as a prerequisite to the granting of a right, is not new in the legislation of this state. From the earliest times the legislature has prescribed the qualifications of sureties, some of the restrictions imposed being more or less burdensome and without much apparent reason. A familiar example is the statute prescribing the qualifications of bail upon arrest, the provisions of which have been made applicable to many other cases where surety bonds are required. It is there provided that no counselor or attorney at law, sheriff, clerk of the superior court, or other officer of such court shall become such bail. So with the sureties on official bonds. Practically every officer of the state and of the several counties, townships and precincts of the state, are required to give bond in some form, yet no person may become a surety for a state or county officer unless he is a resident and freeholder of the state, and no person may become a surety for a township or precinct officer unless he is a resident and freeholder of the county in which the township or precinct is situated. So the statute prohibiting corporations from becoming surety on official obligations, which requires that it be organized for that purpose alone, that it have a capital stock of not less than a designated amount which shall be all subscribed and at least twenty per centum of the same paid in. No one will deny, we think, that security can be found from sources different from that here prescribed which would be as effective for the purpose intended as the security from the prescribed sources, yet no one has ever successfully questioned in the courts the power of the legislature to make the prescribed restrictions. It may be that the legislature could make the restrictions so burdensome as to be unreasonable, and that the same might, for that reason, be void; but, as we have said, we cannot con-

clude, either from the facts shown or from matters of which we may take judicial knowledge, that it has done so in this instance.

Nor does the fact that carriers of the United States mails are exempted from the provision of the act render it void. These perform a service sufficiently differentiated from the ordinary carrier of passengers as to form a class of themselves, and legislation affecting other classes of carriers is not of necessity required to include them. The situation suggested in the appellant's brief, namely, that of a large corporation obtaining a contract to carry the mails and thus monopolizing the jitney traffic in a city, because not subject to the burden of the act, is hardly possible of consummation. The act is not capable of a construction which would permit the owner of a vehicle who has a contract to carry the mails to run it promiscuously over the streets of the city in the carriage of passengers when not engaged in the prosecution of his contract. As we view the act, such an owner can carry passengers without a violation of the provisions of the act only while actually transporting the mails over a route most convenient between the mail stations, otherwise he will fall within its provisions.

Nor are we able to conclude that the statute invades any of the other provisions of the state constitution cited, or any of the provisions of the fourth, fifth or fourteenth amendment to the constitution of the United States. The fourth and fifth amendments of the Federal constitution may be left out of consideration, as it is well settled that these provisions are limitations upon the powers of the Federal government and have no application to the powers of the states. Neither can we see the applicability of the ninth and seventeenth sections of art. 1 of the state constitution. The one provides that no person shall be compelled in any criminal case to give evidence against himself, and the other that there shall be no imprisonment for debt except in cases of absconding debtors. It requires no argument to show that, if the act

be otherwise constitutional, it does not violate either of these provisions.

The principal contention, however, is based on the other provisions of the constitutions cited, which provide that no person shall be deprived of his property without due process of law. The courts have never attempted to define with precision the meaning of the phrase "due process of law," or its equivalent from the Magna Charta, "the law of the land." This not because of uncertainty as to the meaning, but rather because of the inability to encompass within the brief terms necessary to a definition all of the multifarious matters to which the phrase is applicable. Broadly speaking, its purpose is to protect the individual against arbitrary action on the part of the state, that is, to secure the citizen against any arbitrary deprivation of his rights relating to his life, liberty or property. As applied to legislative enactments, it was not intended to subject them to the opinion of the court as to their merit or wisdom, but only in so far as to ascertain whether by the terms of the enactment the individual citizen affected is deprived of some right expressed in the fundamental law, or which "inhere in the very idea of free government, which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity to be heard in his defense."

Tested by these principles, we cannot conclude that the act in question violates this provision of the constitution. The act relates to a subject within the undoubted powers of the legislature to regulate; it applies to all persons in the same situation; it imposes no conditions which cannot be met; and is made enforcible in the mode usual in like matters, that is, by proceedings in the courts after notice and hearing. It may be true that the act is burdensome, and will prevent many from engaging in this form of traffic who would otherwise engage therein. But this is true of all regulation, and to argue that this act is void for this reason is to argue that any form of regulation is void. These, moreover, are not

questions for the consideration of the courts. With the courts the question is one of power, not one of policy. The courts cannot overthrow statutes enacted by competent authority merely because, in the opinion of the judges, they could or should have been made less rigorous.

The question of the power of legislative bodies to enact regulations of the sort contained in the act in question has been a subject for consideration only recently by a number of courts. These, with practical uniformity, have upheld the power. *Ex parte Cardinal, supra; Thielke v. Albee* (Ore.), 153 Pac. 793; *Dresser v. Wichita* (Kan.), 153 Pac. 1194; *Greene v. City of San Antonio* (Tex. Civ. App.), 178 S. W. 6; *Ex parte Sullivan, supra; Ex parte Dickey* (W. Va.), 85 S. E. 781; *Public Service Commission v. Booth* (App. Div.), 156 N. Y. Supp. 140; *City of Memphis v. State* (Tenn.), 179 S. W. 631; *Nolen v. Riechman*, 225 Fed. 812.

An interesting discussion of kindred questions, although not directly upon the point involved, will be found in the cases of *Memphis St. R. Co. v. Rapid Transit Co.* (Tenn.), 179 S. W. 635, where it was held that the operation of vehicles of the kind here in question in violation of a regulative statute could be enjoined in equity at the suit of a private individual injuriously affected thereby.

The only case called to our attention which seems to be contrary to the cases cited is *New Orleans v. Le Blanc* (unreported), in which it was held by a divided court that the restriction imposed as to the character of bond required to be furnished is unreasonable and void. For reasons, however, which we have heretofore stated, we are unable to agree with this conclusion.

The judgment appealed from is affirmed.

MORRIS, C. J., MOUNT, CHADWICK, and ELLIS, JJ., concur.

[No. 12988. Department Two. April 1, 1916.]

ANN ROCHFORT *et al.*, *Appellants*, v. HARRY H. QUIKSTAD *et al.*, *Respondents*.[1]

FRAUD—MISREPRESENTATIONS—COMPLAINT—SUFFICIENCY. A complaint, liberally construed on demurrer as required by Rem. & Bal. Code, § 285, sufficiently states a cause of action for fraud, where it is alleged that plaintiffs were induced to purchase a house and lot in reliance upon false representations that the lot had a frontage of 60 feet and was free from vermin and disease germs, when in fact it had a frontage of but 50 feet and was so infested with vermin and diphtheria germs that one of plaintiff's children contracted diphtheria and the house had to be abandoned and was of no value.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 1, 1915, upon sustaining a demurrer to the complaint, dismissing an action for fraud. Reversed.

Blair & Blinn, for appellants.

PARKER, J.—The plaintiffs, Rochfort and wife, seek recovery of damages from the defendants, alleged to have resulted from the false and fraudulent representations made by the defendants through their agent as to the size of a lot and the condition of a dwelling house thereon, inducing the plaintiffs to purchase the same. The demurrer of the defendants to the amended complaint of the plaintiffs being sustained by the superior court, and the plaintiffs electing not to plead further, judgment of dismissal was rendered against them, from which they have appealed to this court.

The allegations of the complaint, so far as necessary to here notice them, are as follows:

"That on and prior to the 8th day of December, 1913, the defendant, Harry H. Quikstad, was the agent of Martha M. Linder and John P. E. Linder, and as such agent had for sale lot 5, block 1 of Washington addition to the city of Seattle, and the dwelling house situate thereon.

[1]Reported in 156 Pac. 522.

"That about the said 8th day of December, 1913, the said Harry H. Quikstad, as the agent for the defendants, Martha M. Linder and John P. E. Linder, and being by them so authorized to do, represented to the plaintiffs that the said lot contained a frontage of 60 feet, and that the dwelling house situate thereon, was in perfect sanitary condition and was entirely free from vermin, bed bugs and disease germs of any kind.

"That plaintiffs were thereby induced to purchase said lot at the price of $1,650, in the belief that said representations were true, to sign an agreement in writing of which a copy is hereto attached marked exhibit "A" and made a part hereof, but no deed for said lot has yet been executed.

"That on said date the plaintiff, Ann Rochfort, paid $700 in money and property to the defendants, Linder, as a part of the purchase money under said contract.

"That the said lot contained in fact, a frontage of only 50 feet, as the defendants very well knew.

"That the said house, was in fact not in a perfectly sanitary condition and free from vermin, bed bugs and disease germs, but was in fact, as the defendants knew, in a foul and unsanitary condition and so infested with vermin, bed bugs and with the germs of a dangerous disease, to wit, diphtheria, that the house is of no value whatever, and that by reason of the said condition of said house, the children of plaintiffs became sick, and one of them was stricken with diphtheria, and plaintiffs were compelled to abandon the said house.

"That said house is so constructed that it cannot be freed of the said vermin, and bed bugs, except by the total destruction of the house.

"That by reason of the premises plaintiffs sustained damages in the sum of $500."

We are not favored with a brief for respondents, nor does the record before us indicate the views of the learned trial judge which prompted him in holding that the complaint failed to state facts constituting a cause of action, that being the sole ground of the demurrer. The complaint may not be so specific and certain as to be beyond all possible criticism, but we are unable to see wherein it can be held

defective as against a general demurrer. In *Raser v. Moomaw*, 78 Wash. 653, 139 Pac. 622, 51 L. R. A. (N. S.) 707, we recognized the elements of actionable fraud and deceit as being correctly stated in 20 Cyc. 13, as follows:

"It must appear: (1) That the defendant made a material representation; (2) that it was false; (3) that when he made it he knew it was false, or made it recklessly, without any knowledge of its truth, and as a positive assertion; (4) that he made it with the intention that it should be acted upon by the plaintiff; (5) that the plaintiff acted in reliance upon it; and (6) that he thereby suffered an injury."

It seems to us that this complaint, in any event, when liberally construed, as required by Rem. & Bal. Code, § 285 (P. C. 81 § 259), states facts which satisfy all of these requirements of actionable fraud and deceit.

The judgment is reversed, and the cause remanded for further proceedings.

MORRIS, C. J., HOLCOMB, BAUSMAN, and MOUNT, JJ., concur.

[No. 13012. Department Two. April 1, 1916.]

HENNING OBERG, *Appellant*, v. A. J. BERG, *Respondent*.[1]

MUNICIPAL CORPORATIONS—USE OF STREETS—AUTOMOBILES—NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY. Whether defendant was guilty of negligence in leaving his automobile on a grade in such a way that it started by force of gravity and injured plaintiff, or whether his negligence was the proximate cause of the injury, are questions for the jury, where it is shown that the car would not have started if it had been properly secured, that it did start very soon after plaintiff left it, and the evidence was conflicting as to whether any one meddled with it.

Appeal from a judgment of the superior court for King county, Frater, J., entered February 26, 1915, upon the verdict of a jury rendered in favor of the defendant by direction of the court, in an action in tort. Reversed.

Arctander & Jacobsen, for appellant.

Elias A. Wright and *Sam A. Wright*, for respondent.

PARKER, J.—The plaintiff, Oberg, seeks recovery of damages which he claims resulted to him from the negligence of the defendant, Berg, in that he left his automobile upon Union street, in Seattle, in such an insecure position that it started by the force of gravity alone and ran over the plaintiff, inflicting upon him injuries for which he seeks recovery. At the conclusion of all the evidence, upon motion of counsel for the defendant, the trial judge directed the jury to return a verdict in favor of the defendant, which was accordingly done and judgment entered thereon, from which the plaintiff has appealed, his counsel insisting that the evidence was sufficient to carry the case to the jury upon the question of defendant's negligence.

Union street, between Second and Third avenues, has considerable of a down grade towards Second avenue to the west, the grade being such that an automobile standing upon that

[1]Reported in 156 Pac. 391.

portion of Union street is required to be well secured in place to prevent it from running down the street by the force of gravity. At the time of the injury to appellant for which recovery is sought in this action, respondent drove his automobile down Union street from Third avenue, stopping on the north side at the curb of Union street, to the east and just above the alley between the avenues, so that his automobile stood nearly parallel with the curb. He says that he applied his emergency brake, making it fast in the usual manner, and cramped the right front wheel against the curb. He then left the machine, proceeding into a nearby restaurant. Very soon after he left the machine—the jury might have concluded that it was within one or two minutes—the machine started down Union street, and having obtained considerable momentum, ran over appellant, causing the injuries for which he seeks recovery. There was testimony tending to show that, just after the machine was left by respondent, a boy was seen meddling with it. There was also testimony tending to show that the machine, at all times from the time it was left by respondent until it started and ran down the street and injured appellant, was not touched or meddled with by any person. The evidence is conflicting upon the question of any one meddling with the machine during that period and that being the cause of its starting.

Let us consider the question of respondent's negligence without regard to the question of another person meddling with the machine after it was left by respondent, and first determine whether the other evidence alone was such as to call for the submission of the case to the jury upon the question of respondent's negligence. The problem, in its last analysis, is whether or not the starting of the machine by the mere force of gravity, assuming no one touched it after it was left by respondent, was sufficient under the circumstances to warrant the jury concluding that respondent was negligent in not properly securing the machine in position

when he left it. In 1 Shearman & Redfield, Negligence (5th ed.), § 59, we read:

"When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care."

These observations of the learned authors were quoted with approval by this court in *Wodnik v. Luna Park Amusement Co.*, 69 Wash. 638, 125 Pac. 941, 42 L. R. A. (N. S.) 1070, and we think are decisive in support of appellant's contention. We have seen that Union street at this point is of such a grade that an automobile standing thereon must be secured in place with considerable care to prevent it running down the street by the force of gravity alone, and that the machine had been brought to rest by respondent a very short time before it did start and run over appellant. It also seems plain, as shown by the evidence, that, had the machine been properly secured, it would not, by the force of gravity alone, have started. In the light of these considerations, we think the jury might have concluded, as reasonable men, that the machine started by the force of gravity alone and because of respondent's negligence in not properly securing it when he left it. While it may be conceded that these facts standing alone would not make a very convincing case against respondent, we think it cannot be said that reasonable minds might not differ as to the proper conclusion to be drawn therefrom.

It seems plain to us that the question of respondent's negligence cannot be resolved in his favor as a question of law upon the theory that the machine was started by the meddling of some other person for whose actions he was not responsible, since that would be a question of fact for the jury to decide, in view of the conflicting evidence thereon. Counsel for respondent call to our attention, and rely upon, the decisions

of the New York courts in *Berman v. Schultz*, 84 N. Y. Supp. 292, and *Vincent v. Crandall & Godley Co.*, 131 App. Div. 200, 115 N. Y. Supp. 600. The *Berman* case was presented to the court as a question of fact, the cause being evidently tried without a jury. If this case had been so tried and the judge had found in favor of the respondent, we probably would not have disturbed such finding. But this is not a case for the determination of the court as a question of fact upon the merits, but only for the determination of the question of whether or not the evidence was sufficient to carry the case to the jury upon the question of respondent's negligence. They might or might not have found for the respondent. In the *Vincent* case, it appears that it was stipulated upon the trial that, while the machine was securely left by its owner, it was started by the wilful act of some mischievous boys, concededly bringing into the case an intervening cause for which the defendant was not responsible.

Counsel for respondent also direct our attention to the decision of this court in *Lewinn v. Murphy*, 63 Wash. 356, 115 Pac. 740, Ann. Cas. 1912 D. 433, involving an injury to a workman by the falling of a piece of timber from an upper story of a building which was in the course of construction, in which case it was held that there was no proof of facts from which negligence of the employer could be inferred. That case, we think, is distinguishable from this, as appears from the following observations at page 361 of the opinion:

"There is nothing in the case before us to justify a holding that the falling of a piece of timber in an incompleted building, with practically open spaces between the different floors, is of such an unusual and extraordinary occurrence that it would not happen except for want of due care on the part of the contractor, or that the cause of the fall was something over which the contractor had absolute and complete control; and that in the nature of things there could be no fall except in the negligent doing of some act peculiarly within the knowledge and control of the contractor. If the

falling object was one that had been permanently put in place, upon whose stability, firmness and immovability the employee had a right to rely, and to assume the use of due care and caution in making it firm and stable, there might be debatable ground for the application of such a rule, but we can find none in the situation presented in this record."

We conclude that it was for the jury to say whether or not respondent was negligent, and whether or not such negligence was the proximate cause of the machine starting and of appellant's injury. The judgment is reversed, and appellant is granted a new trial. The case is remanded to the superior court for further proceedings.

MAIN, BAUSMAN, and HOLCOMB, JJ., concur.

[No. 13040. Department Two. April 1, 1916.]

VULCAN MANUFACTURING COMPANY, *Respondent*, v. PACIFIC SEA PRODUCTS COMPANY, *Appellant*.[1]

APPEAL—REVIEW—FINDINGS. Findings upon conflicting and evenly balanced oral testimony will not be disturbed on appeal.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered April 9, 1915, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Winfield R. Smith, for appellant.

Fred W. Llewellyn, for respondent.

PARKER, J.—The plaintiff seeks recovery of the purchase price of twenty harpoons, specially manufactured by it for defendant. Trial in the superior court without a jury resulted in findings and judgment in favor of the plaintiff, from which the defendant has appealed.

There are presented to us upon this appeal questions of fact only. These have reference to (1) the quality and

[1]Reported in 156 Pac. 400.

weight of the harpoons as compared with the sample furnished to respondent as a pattern; (2) the terms of the contract, which was oral, as to the agreed time for the completion of the harpoons; and (3) the completion of the last ten harpoons within the agreed time, which last ten appellant refused to accept because, as claimed by it, they were not completed within the time limited by the contract. The trial court determined all of these questions in respondent's favor, and did so in the light of testimony nearly all of which was oral and in sharp conflict upon all of these questions. We have reviewed the evidence with great care, as found in the record, and are unable to say that it does not preponderate in support of the conclusion reached by the learned trial judge. Reading the evidence in cold typewriting leads us to regard it as fairly evenly balanced, rendering it very difficult to determine on which side it preponderates as to each of these questions. This, in view of the trial court's opportunity to see and hear witnesses testify, furnishing him much better opportunity to weigh the testimony of each witness, induces us to conclude that we should not disturb his disposition of the cause in respondent's favor.

There is some evidence which seems to be uncontradicted, pointing to the fact that the harpoons manufactured by respondent were not exactly in all particulars like the sample furnished by appellant as a pattern. These differences are, however, very slight, and we think not such as would require the trial court, in the light of all the evidence, to say that there was not a substantial compliance with the contract in this respect. We think that the doctrine of substantial compliance, in the light of all the evidence as heard by the trial court, warranted it in deciding in respondent's favor. In any event, we cannot see our way clear to decide otherwise.

The judgment is affirmed.

MORRIS, C. J., MAIN, and HOLCOMB, JJ., concur.

BAUSMAN, J., took no part.

[No. 13052. Department Two. April 1, 1916.]

BALFOUR, GUTHRIE & COMPANY, *Respondent*, v. BRESLAUER, RAMSEY & COMPANY, INCORPORATED, *Appellant*, A. BRESLAUER, *Defendant*.[1]

CORPORATIONS—CONTRACTS—ACTIONS—EVIDENCE—SUFFICIENCY. A promise by a newly formed corporation to pay the outstanding debts of a business purchased of one of the promoters, pursuant to a resolution reciting that such promoter "had offered to sell" the business for $3,000, is sufficiently established by the preliminary agreement to incorporate so providing, signed by the promoters, who became officers and directors and holders of all the capital stock of the new corporation; since the resolution referred to the previous agreement, and was an acceptance of the proposition therein contained.

Appeal from a judgment of the superior court for King county, Humphries, J., entered May 17, 1915, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Chas. E. Allen and *Robert A. Devers*, for appellant.

Kerr & McCord, for respondent.

PARKER, J.—The plaintiff, Balfour Guthrie & Company, a copartnership, seeks recovery from the defendants, A. Breslauer and Breslauer, Ramsey & Company, Incorporated, of the purchase price of four invoices of salt, claimed to have been sold by the plaintiff to the defendant Breslauer and agreed to be paid for by the defendant Breslauer, Ramsey & Company, Incorporated, upon that company's becoming the purchaser of the brokerage business of A. Breslauer. Trial before the superior court without a jury resulted in findings and judgment against both defendants for the full amount claimed, from which the defendant Breslauer, Ramsey & Company, Incorporated, has appealed. The defendant Breslauer has not appealed.

[1]Reported in 156 Pac. 398.

For several years prior to the sale of his business to Breslauer, Ramsey & Company, Incorporated, upon the incorporation of that company, A. Breslauer was engaged in the merchandise brokerage business in Seattle, dealing in salt and other commodities. He purchased of respondent four separate invoices of salt as follows: On March 2, 1914, $25.50; on March 7, 1914, $156.60; on March 11, 1914, $406.74; and on March 30, 1914, $160. On March 24, 1914, S. V. Ramsey was introduced to Breslauer by W. P. Sprague, and immediately negotiations commenced between these three looking to the organization of a corporation for the purpose of purchasing and continuing the business of Breslauer in Seattle. On that day, or possibly the next, they arrived at an agreement which was then roughly reduced to writing in pencil, as follows:

"Agreed to incorporate for $10,000. Adolph Breslauer to sell his present business to the new concern for $3,000. Samuel V. Ramsey $3,000 cash to equal. Outstanding bills against A. Breslauer business, Central building, to be paid by the new corporation, but charged against A. Breslauer personally at 5%. Breslauer, Ramsey & Co., Inc., 100 shares of $100 each. Mr. Sprague two shares. 49 shares each. Principal place of [business], Seattle, Wash. Adolph Breslauer, President and General Manager, Samuel V. Ramsey, Vice-president and Treasurer, Wendell P. Sprague, Secretary.
S. V. R.
"A. B."

Ramsey and Breslauer signed their initials to this writing to evidence their assent thereto. Sprague did not sign the writing in any manner, but he was present at the time and fully assented thereto. On the back of this paper there appears these words, evidently written by Sprague:

"All old bills to be paid by Mr. Ramsey, Mr. Breslauer will give Mr. Ramsey his personal note for 5% int."

These words are not signed in any manner. The oral evidence is in serious conflict as to these words being any part of the agreement and as to their being written upon the back

of the paper at the time. On March 31, 1914, articles of incorporation having been executed, were filed in the proper public offices, completing the incorporating of Breslauer, Ramsey & Company, Incorporated. On the same day, in compliance with the preliminary agreement above quoted, Breslauer subscribed for forty-nine shares of the capital stock, and paid $3,000 thereon by transferring his business to the corporation; Ramsey subscribed for forty-nine shares of the capital stock and paid $3,000 thereon in cash, and Sprague subscribed for two shares of the capital stock. On the same day, the first meeting of the trustees was held; Breslauer, Ramsey and Sprague being the trustees and the only officers of the corporation as well as the owners of all its capital stock. Breslauer's business was then transferred to the corporation, in pursuance of a resolution of the trustees adopted at that meeting and spread upon their minutes as follows:

"Whereas, A. Breslauer has offered to sell to Breslauer, Ramsey & Company, Incorporated, all and every part of his going import and export brokerage and merchandise business and the good will thereof, with a consideration of a credit of $3,000 to be applied toward the purchase of forty-nine shares of capital stock of Breslauer, Ramsey & Company, Incorporated, at the par value of $100 per share; and,

"Whereas, it appears to the stockholders that said proposition is necessary for the business of this company and that the same is of the value of $3,000;

"Resolved, that the board of trustees of this company be and they hereby are authorized in their discretion to accept that offer and purchase the property above mentioned for the said price and to issue said number of shares of stock in payment therefor."

There is no written evidence of Breslauer's proposition which is referred to in this resolution except the above quoted preliminary agreement entered into between the three incorporators who became the trustees of the corporation and the owners of all its stock in pursuance of that agreement. The

salt purchased on March 2d, 7th and 11th, was delivered by the respondent before the transfer of Breslauer's business to the corporation. The salt purchased on March 30th was evidently delivered by respondent after the transfer of Breslauer's business to the corporation. In any event, the corporation admits its obligation to pay for this last purchase of salt, evidently upon the theory that it was not delivered until after the corporation had taken over the business. Tender of the $160 due upon this purchase was made by the corporation and deposited in court shortly after the commencement of this action.

A large amount of oral evidence was introduced touching the question of the corporation agreeing to pay the indebtedness of Breslauer, incurred in his business, upon its transfer to the corporation. Much of this evidence is in serious conflict, though it may be said that the evidence shows with a fair degree of certainty that the corporation, by its acts and payments made after its organization, did assume and pay a considerable portion of the indebtedness of Breslauer incurred in his business prior to its transfer to the corporation. The denial by the corporation of its agreement to pay Breslauer's indebtedness seems to be directed to this particular indebtedness only. The trial court found that:

"The said corporation assumed and agreed to pay the merchandise indebtedness of said Breslauer, including all sums due the plaintiffs."

This is the theory upon which the judgment was rendered against the corporation and upon which respondent's counsel sought to recover. No attempt was made to comply with the sales-in-bulk law, nor is that law invoked in respondent's behalf.

This controversy, in its last analysis, presents only a question of fact; that is, Did Breslauer, Ramsey & Company, Incorporated, assume and agree to pay Breslauer's indebtedness, including the purchase price of the invoices of salt of March 2d, 7th and 11th? We are constrained to agree with

the trial court in its conclusion upon this question. It is true that the preliminary agreement between Breslauer, Ramsey and Sprague, looking to the organization of the corporation and the taking over of Breslauer's business and prescribing the conditions upon which each was to become a stockholder and the manner of paying for the stock, was made before the existence of the corporation; but it must be remembered that no one other than these three persons had anything to do with the organization of the corporation, nor did any one else become in any manner interested in the corporation, either as officer or stockholder. This, we think, is sufficient to warrant the conclusion that the proposition of Breslauer to transfer his business to the corporation, referred to in the resolution of its trustees, was the proposition contained in the preliminary agreement made between these three, looking to the organization of the corporation and the transfer of Breslauer's business to it. That preliminary agreement, so far as Breslauer is concerned, became a standing offer to the future corporation for such reasonable time as might be required to prepare, execute and file articles of incorporation giving it a legal existence. In view of the dealings between these three persons looking to the formation of the corporation, and the fact that they were the only officers and stockholders of the corporation at the time of the adoption of the above resolution, we think that the proposition of Breslauer, mentioned in that resolution, means his proposition as contained in the preliminary agreement, which plainly contemplated the payment by the corporation of Breslauer's debts incurred in his business. The writing upon the back of the paper, we think, should not be considered a part of the agreement or Breslauer's proposition, in the light of the conflicting evidence and the absence of signatures thereto.

Our attention is called to the decision of this court in *Mooney v. Mooney Co.*, 71 Wash. 258, 128 Pac. 225. In that case, however, there was an offer made in writing to sell a business to a corporation in payment of the seller's

stock subscription, and an acceptance thereof by resolution of the corporation's board of trustees. The whole transaction being so evidenced in writing, and the writing being silent upon the question of the assumption of the debts of the business incurred previous to its transfer to the corporation, the court held that parol evidence could not be received to establish the assumption of such debts by the corporation, and that the writings did not evidence such an agreement. In the present case, we think the writings evidencing the contract for the transfer of Breslauer's business to the corporation, in the light of all the surrounding circumstances, does show a promise on the part of the corporation to pay these debts of Breslauer. The resolution of the trustees, above quoted, was in effect an acceptance of the terms of Breslauer's proposition and agreement to sell his business to the corporation, as contained in the preliminary agreement, the same as if that proposition had been first made after the actual coming into existence of the corporation. This conclusion, we think, finds support in 7 R. C. L. 60, and 3 Cook, Corporations (7th ed.), § 707.

We are of the opinion that the judgment should be affirmed. It is so ordered.

MAIN, BAUSMAN, and HOLCOMB, JJ., concur.

[No. 13067. Department Two. April 1, 1916.]

SYLVESTER WILKINS, *Respondent*, v. H. P. KESSINGER, *Appellant*.[1]

CUSTOM AND USAGES—CONTRACTS—ADMISSIBILITY. Evidence of a local custom or usage is inadmissible to support the claims of either party as to the terms of a contract that is not ambiguous or of doubtful meaning.

SAME—PLEADING—NECESSITY. Evidence of a local custom or usage to divide a broker's commission is inadmissible in an action on implied contract, unless the existence of the custom is specially pleaded.

BROKERS—COMMISSIONS—DIVISION. The rule for the division of a broker's commission where two brokers cooperate in effecting the sale is not applicable where one broker took no part in accomplishing the deal, but only listed the property with the other broker.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered November 9, 1914, upon findings in favor of the plaintiff, in an action to recover a broker's commission, tried to the court. Reversed.

J. B. Keener, for appellant.

A. H. Garretson, for respondent.

MAIN, J.—This action was brought for the purpose of recovering one-half of the commission earned upon a real estate transaction. The cause was tried to the court without a jury, and resulted in a judgment in favor of the plaintiff for the sum of $113.75. From this judgment, the defendant appeals.

The appellant construes the complaint as alleging an express contract for an equal division of the commission. The respondent construes the complaint as an implied contract, at least in so far as it pertains to the manner of the division of the commission. In the complaint, there is no allegation of a local usage or custom among real estate brokers in the

[1]Reported in 156 Pac. 389.

city of Tacoma as to how the commission shall be divided when two brokers cooperate in the sale, and there is no express agreement. Upon the trial, the respondent offered evidence for the purpose of showing that there existed among real estate men in that locality a custom or usage by which, in the absence of a special agreement, the commission earned was to be equally divided between the two brokers. This evidence was admitted over objection. Construing the complaint as alleging an express contract for an equal division of the commission, the evidence of a local custom or usage was inadmissible. The rule is that, where the terms of the contract as alleged are not ambiguous or of doubtful meaning, evidence of a local custom or usage is inadmissible for the purpose of supporting the claim of either party as to what the terms of the express contract were. *Vollrath v. Crowe*, 9 Wash. 374, 37 Pac. 474; *Williams v. Ninemire*, 23 Wash. 393, 63 Pac. 534; *Peyser v. Western Dry Goods Co.*, 53 Wash. 633, 102 Pac. 750.

In the *Williams* case, it was said:

"It is only where a contract is silent in some particular or is ambiguous that proof of custom is admissible, and such proof is then admissible only for the purpose of finding out what the contract really was, and not to overthrow it. Proof of custom is received in such cases upon the assumption that, as to those matters not covered by express stipulations in the agreement, the parties are presumed to have made their contract with reference to the established custom and usage of that place; and these the law will incorporate into the contract, in order to explain or complete it. But it is always within the power of the parties to exclude custom from their dealings by their express agreement, as was done in this case."

Construing the complaint as not alleging an express agreement for an equal division of the commission, but as relying upon an implied contract as to the manner of the division, the evidence of a local custom or usage was inadmissible, because the existence of such local custom or usage was not

pleaded. The rule is that a local custom or usage, applicable to a special or particular business, must be pleaded before evidence is admissible to show the existence of such custom or usage. *Pittsburg Steel Co. v. Streety*, 61 Fla. 393, 401, 55 South. 67; *Lindley v. First Nat. Bank of Waterloo*, 76 Iowa 629, 41 N. W. 381, 14 Am. St. 254, 2 L. R. A. 709; *Hayden v. Grillo's Adm'r*, 42 Mo. App. 1; *First Nat. Bank of Hastings v. Farmers' & Merchants' Bank*, 56 Neb. 149, 76 N. W. 430; *Wilmington City R. Co. v. White*, 6 Penn. (Del.) 363, 66 Atl. 1009; *Smith v. Stewart*, 29 Okl. 26, 116 Pac. 182; 6 Standard Ency. Proc. p. 331.

In the cited volume of Standard Ency. Proc., at page 331, the rule is stated in this language:

"A local custom or usage, or a custom or usage applicable to a special or particular business, may not, as a general rule, be made the basis of recovery in an action, unless such custom or usage is pleaded by the party relying on it."

While there is doubtless some authority to the contrary, it would seem that this rule is founded in reason. If the local custom or usage which is to be relied upon is pleaded, the opposite party is advised of the contention, and may prepare to meet it. If it is not pleaded, the evidence thereof, when offered, may come as a complete surprise. The decision upon this question is decisive of the action. It becomes unnecessary to review the evidence.

It may be remarked, however, in passing, that in this case, even though the evidence had been admissible under the pleadings, it is doubtful whether it would sustain the existence of a local usage or custom which would entitle the respondent to recover. Running through much of the testimony offered of the custom or usage, there were two elements which are not applicable in this case: One was the assumption that the same rule of division would obtain for securing a listing of property that would obtain when two real estate brokers cooperate in effecting a sale. The other was that

the respondent and the appellant had worked together in accomplishing the sale in which the commission was earned over which this dispute arose. In this case the respondent caused the land of one of the parties to the exchange to be listed in the appellant's office. The evidence fails to show that he had any part in bringing about the sale, which occurred more than a year thereafter. It is quite apparent that the rule of division, as applied when two parties cooperate in effecting a sale, would not be applicable when one party took no part in accomplishing the deal, but only caused the property to be listed in the office of the other.

The judgment will be reversed, and the cause remanded with direction to the superior court to dismiss the action.

MORRIS, C. J., HOLCOMB, BAUSMAN, and PARKER, JJ., concur.

[No. 13098. *En Banc.* April 1, 1916.]

THE STATE OF WASHINGTON, *on the Relation of Washington Paving Company, Plaintiff*, v. C. W. CLAUSEN, *as State Auditor, et al., Respondents.*[1]

HIGHWAYS—CONSTRUCTION WORK—COMPETITIVE BIDDING. A contract for highway work, required by 3 Rem. & Bal. Code, § 5879-9, to be let upon competitive bidding to the lowest responsible bidder, is not void, but only voidable, for the fraud of the owner of a patented process in making a secret contract with the successful bidder reducing to him the price of the patented process, which the call for bids required to be furnished at the same price to all bidders.

ESTOPPEL—IN PAIS—AGAINST STATE. The state is estopped to question the validity of a contract for highway work where it accepted the benefits and allowed the contractor to complete performance after knowledge that the successful bidder had obtained a fraudulent advantage over other bidders by means of a secret agreement with the owners of a patented process.

MORRIS, C. J., MAIN, FULLERTON, and ELLIS, JJ., dissent.

Application filed in the supreme court September 27, 1915, for a writ of mandamus to compel the state highway commis-

[1]Reported in 156 Pac. 554.

sioner to certify his acceptance of work done under a contract for the construction of a highway, and to compel the state auditor to draw a warrant in payment thereof. Writ granted.

Charles O. Bates and *Hayden, Langhorne & Metzger* (*William H. Pratt* and *J. M. Head*, of counsel), for relator.

The Attorney General and *Howard Waterman, Assistant* (*John A. Shackleford* and *Glenn Fairbrook*, of counsel), for respondents.

BAUSMAN, J.—This is an original proceeding in mandamus to compel payment for a highway built under a contract let by Pierce county pursuant to 3 Rem. & Bal. Code, § 5879-1 *et seq.* The plans and specifications, approved by the state highway commissioner, provided that the paving be one of twelve kinds, on all of which bids being called for and various received, the relator became successful with one called bitulithic. Having long ago completed its work without payments, it alleges that the state highway commissioner actually, though not formally, accepted the work, has no just objections, and unreasonably withholds his certificate. Testimony on both sides is before us on an order of reference. The *Attorney General*, for the defendant officials, urged fraud in the original bid and defects in the work.

As to the first. Even before the contract was executed, one Warter, a taxpayer, commenced in Pierce county an action to enjoin the county commissioners from entering into it, alleging that the relator was getting it by fraudulently concealing a secret price from the patentees that gave him an advantage over other bidders. That action was dismissed without prejudice after a hearing.

Upon this dismissal the commissioners executed the contract and the relator immediately went forward with it. Nevertheless, another taxpayer, one Reynolds, of Pierce county, brought, a month after Warter's dismissal, an action in

Thurston county on similar allegations against this relator, the Pierce county commissioners, the state highway commissioner, and the state auditor, to prevent payment by the state. The highway commissioner and the auditor appearing through the *Attorney General*, a preliminary injunction was granted, only to be soon rendered nugatory by this court in *State ex rel. Pierce County v. Superior Court*, 86 Wash. 685, 151 Pac. 108, a proceeding in prohibition by the present relator. In that case we held that it was for the *Attorney General* and not for taxpayers to enjoin misappropriations of state funds. In the argument here the *Attorney General*, appearing only as *amicus curiae*, asserted the right of the taxpayer to sue.

By the Warter suit alone the alleged fraud had been noised about before the contract was so much as let and work begun; nor, under the statutory relations between the state and county officials in this work, can it be pretended that the former were less apprised than the latter. Before this work was begun, therefore, a taxpayer had failed, and the state had not used its opportunity, to prevent it.

We have repeatedly held that, in its business relations with individuals, the state must not expect more favorable treatment than is fair between men. *State ex rel. Gillette v. Clausen*, 44 Wash. 437, 87 Pac. 498; *Spokane Street R. Co. v. Spokane Falls*, 6 Wash. 521, 33 Pac. 1072; *State ex rel. Maddaugh v. Ritter*, 74 Wash. 649, 134 Pac. 492; *Ettor v. Tacoma*, 77 Wash. 267, 137 Pac. 820. The state, in its dealings with individuals, should be held to "resolute good faith." *State v. Milk*, 11 Fed. 389.

We have not to do here with the question of limitation of actions or with laches, but with estoppel *in pais;* and even where the government may not be barred by mere laches, it may be estopped *in pais* by such actions with individuals as make it a "question of honest dealing." Gilbert, Circuit Judge, in *United States v. Willamette Valley etc. Co.*, 54 Fed. 807, 811. Here we have the state in business relations. Would

an individual be allowed to keep on receiving goods under a written contract in which, before any were delivered, he knew that he had been swindled in the price and yet make no complaint until all were in his warehouse? This, in effect, is what the state is doing here. It daily received labor and materials from this contractor, waited until the work was completed, and then put itself in a position where, knowing the contractor cannot take out and sell these things again, it can dispute his claim. This is not a case of estoppel claimed by mere inaction of public officers. It is a case of their acting. Daily did those officials not only permit the delivery of labor and material on the public property, but see to it that it was laid to suit them. The state, on its present argument, was holding this contractor at a merciless disadvantage. By the agreement he was compelled to finish this work in a comparatively short time. Should he pause to see whether the state would attack the contract? He would then lose time which, if the state chose not to object, would be set up against him.

As in *Ettor v. Tacoma, supra*, we are of opinion that the state is estopped. But shall the contractor be relegated to *quantum meruit* or enjoy the contract itself? We sustain him in the latter. As for the fraud, it is not necessary in this case to pass upon that or upon the status of a bid on patented process unaffected by waiver or estoppel.

This contract was not void. Without reviewing a mass of authorities, often inharmonious and often perplexing through a loose application of the word void to acts not *ultra vires*, we are clear that this was only a voidable contract subject to ratification. There was no such impairmant or exclusion of competition as to render this bargain absolutely void. To begin with, the board was competent to contract for this road. What it was buying was not something forbidden or outside of its powers. Now, no fraud being alleged against the board itself, we must assume that, when it invited bids for twelve kinds of pavement, one kind was as acceptable as another and any might have been chosen. Competitive bidding

there was. Nobody claims that the board was using the other eleven kinds as a blind with secret arrangement to deal only on bitulithic. It was, then, honestly proceeding in the second step of competent authority. This is not a case of wholly leaving out an indispensable step or condition precedent, as in *Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 226, 114 Pac. 457, where the commissioners let a bridge contract without bid whatever. Between fraud in the call and fraud in the bid, we must distinguish. The secret fraud of the bidder had not impaired the statutory machinery of contract, and his fraud, if any, was one which could be waived. When my vendor cheats me in the contract price or quality, I may waive that when I discover it and decide that the bargain is still a good one, accept or retain the goods, and ratify the thing. On such grounds, contracts are merely voidable.

To hold this contract absolutely void we should have to say so on the call itself and pronounce the proceedings actually or substantially *ultra vires*. Is the including an invitation to one patented process to vitiate a call that includes fifty kinds not patented, because on the one competition is less free? In *Great Northern R. Co. v. Leavenworth*, 81 Wash. 511, 142 Pac. 1155, we did not find it necessary to decide this, for there the patentee filed consent to make the process available to any successful bidder, and on the bare proposition there is great discord of authority. But whether or not a call on one alone is bad without the patentee's proffer, we are clear that, when the call in good faith includes other kinds, there is not that utter absence of legality which is called void. As a test, nobody would quickly say that the contractor here, after getting the award, could have repudiated it as binding on no one, *ultra vires*, and something on which his sureties would not have to respond. It would be going excessively far to say that this contract could not even be ratified by the state if actually a profitable one.

We do not say that, to be void, a contract must be either a forbidden one in terms or one plainly beyond a public body's

functions, for even within its jurisdiction, it may leave out some step so plainly essential and precedent to an exercise of its powers that one may say that the very persons who dealt with it knew that what they were doing was wrong. The exact line we do not purpose to draw. That is best left to instance and degree. It is enough to pronounce this contract at most but voidable.

As to the second ground, it is palpable from the record that the faults in the performance now discussed are so small as to be almost within the rule of *de minimis*. The state highway commissioner, for his part, gives no testimony against that performance. His first assistant is called instead. That officer admits that his superior had said that he had no objection to the work, which he would accept were it not for the pendency of the Thurston county injunction. Now that was soon held to be without jurisdiction. Nor can this assistant point out any defects that strike us as amounting to just complaints. He concedes, too, that to the county engineer had been left the inspection and that that engineer was satisfied. No good reason does he give why the few things he points out today were not immediately complained of that the relator might remedy them. Indeed, much that is now drawn into this controversy has to do with whether the original specifications were what they should have been, a question surely settled by the parties in their contract.

In the most gigantic contracts between private parties the courts have never hesitated to say that the certificate of an architect or engineer was earned and would be considered as delivered when in truth it ought to have been delivered and was withheld with no good reason. There is no sound authority against applying that doctrine to municipal construction contracts. *County of Cook v. Harms*, 108 Ill. 151; *Slaughter v. State ex rel. Mitchell*, 132 Ind. 465, 31 N. E. 1112.

To conclude, in *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207, we held that, mandamus being in this state a civil proceeding, if from all the facts it clearly appears

that a relator would prevail in an ordinary suit after mandate to a public official, such as the highway commissioner, to act and either refuse or give his acceptance, this court would act directly upon the public official and require payment, rather than perhaps drive the relator to another suit that would be only a form expensive to both parties after acceptance refused upon mandate to act. In the present proceeding, we are convinced that the relator's right to the highway commissioner's certificate is perfectly maintained, that he is entitled to it now, and to payment by the state in due course.

Let the writ issue, requiring payment by the respondent state auditor of whatever shall be found due upon this contract as one accepted and approved in all legal respects by the respondent highway commissioner.

MOUNT, PARKER, and HOLCOMB, JJ., concur.

CHADWICK, J. (concurring)—It is within the powers of the public authorities to let contracts for public improvements. The contract let in this case was, therefore, voidable and not void.

The state, by its conduct, is estopped to deny the obligation of its contract after having notice of the things now set up against it.

I do not want to be understood as indorsing or giving a judicial approval to the manner in which the contract was let in this case. Had the case referred to as the "Warter case" come to this court, I would have concurred in an opinion holding that the contract should not be entered into by the commissioners.

Wherefore, upon the ground of estoppel, I concur in the opinion of the court.

MAIN, J. (dissenting)—The basic error in the majority opinion is in the holding that the contract in question is voidable only, and not void. The statute, 3 Rem. & Bal. Code, § 5879-9, requires that such a contract shall be awarded to

the "lowest responsible bidder;" and saves the right to the board to reject any and all bids. A statute which requires that a contract shall be awarded to the "lowest responsible bidder" is equivalent in meaning to a statute which requires "competitive bidding." *Great Northern R. Co. v. Leavenworth*, 81 Wash. 511, 142 Pac. 1155.

Where a statute requires that contracts for public work shall be let upon competitive bidding, or to the lowest responsible bidder, any secret fraud practiced on the part of the successful bidder or bidders which tends to avoid the competitive requirement of the statute, renders the contract void, not voidable.

In 6 R. C. L. 813, it is said:

"Though there are English and Canadian decisions to the contrary, the rule is settled in the United States that agreements which, in their necessary operation upon the action of contractors bidding for public work, tend to restrain the natural rivalry and competition of the parties, and thus produce a result disadvantageous to the public, are against public policy, and void."

See, also, 2 Dillon, Municipal Corporations (5th ed.), § 781; Editor's note to the case of *Citizens' Nat. Bank of Chickasha v. Mitchell*, 20 Am. & Eng. Ann. Cas. 386.

The fact that a good road may have been constructed under the contract in question, and that the relator was the only person equipped to properly perform the contract, if such are the facts, have no bearing on the question. Contracts awarded in defiance of the statutory provision requiring competitive bidding are illegal in their nature and tendency, and for that reason no inquiry is necessary as to the particular effect of any one contract, because it would not alter the general nature of the contract, or the force of public policy which condemns them.

In *Conway v. Garden City Paving & Post Co.*, 190 Ill. 89, 60 N. E. 82, it is said, speaking with reference to such contracts:

"The test of illegality is not the result in a particular case, but the tendency of the contract if recognized as valid in the law."

In *McMullen v. Hoffman*, 174 U. S. 639, with reference to the same question, it was said:

"Contracts of the nature of this one are illegal in their nature and tendency, and for that reason no inquiry is necessary as to the particular effect of any one contract, because it would not alter the general nature of contracts of this description or the force of public policy which condemns them."

The contract, being void, cannot be made the basis of an action. The contractor's only remedy is for the reasonable value of the work done and the materials furnished. In other words, the remedy is not upon the contract, but upon a *quantum meruit*. *Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 226, 114 Pac. 457.

In this case, in the proposal for bids, one kind of paving specified was "Bitulithic surface material," which was a patented article. The specifications required the patentee to furnish this material to any successful bidder at a definite reasonable price per square yard. The patentee was required to file with the board what is known as a license agreement or statement that it would furnish such patented material to any successful bidder at the price named. This license agreement or statement was filed, and provided that the Bitulithic surface paving mixture would be furnished to any contractor at ninety cents per square yard. The patentee, at the time, had a secret agreement with the relator whereby it could acquire the Bitulithic paving mixture at a cost to it of approximately thirty-eight cents less per square yard than other contractors would be required to pay under the license agreement filed with the board. It requires no argument to show that, under the secret agreement with the patentee, the relator had a material and substantial advantage over any other contractor that might desire to bid upon that particular kind

of paving. The secret agreement which the relator had with the patentee was destructive of the competitive feature required by the statute, and rendered the contract awarded in pursuance thereof absolutely void.

The fact that a number of other kinds of pavement were called for in the proposal, and bid upon, does not alter the situation. The bitulithic pavement being a patented article, may be used under a statute which requires competitive bidding, provided it can be acquired at a reasonable price, and is bid upon in such a way that it will be subject to the greatest amount of competition which is possible. This is the doctrine of the case of *Great Northern R. Co. v. Leavenworth*, 81 Wash. 511, 142 Pac. 1155. In that case it was held that the bid upon Bitulithic paving, where the license agreement had been filed agreeing to furnish the article to any successful bidder at a reasonable price named, satisfied the statute as to the requirement for competitive bidding. But so far as the record shows, at least, the successful bidder in that case did not have a secret agreement which provided for a price different or less than that specified in the license agreement filed, and to which all bidders had access.

In my opinion, the method adopted to secure the contract in question was unfair to other bidders, injurious to the public, indefensible in morals, and renders the contract illegal and void in law. For the reasons stated, I am unable to concur in the majority opinion, and therefore dissent.

MORRIS, C. J., concurs with MAIN, J.

FULLERTON, J. (dissenting)—I concur with Judge Main in the conclusion that the contract between the county commissioners and the relator is void. But if the rule be that the contract is voidable only, as held by the majority, I cannot concur in the conclusion that the state is estopped from questioning it. The facts showing the contract to be voidable developed upon the trial of the suits brought by the individuals to restrain the payments. This was the first knowledge

the officers of the state had of the fraud, and from that time on they have acted consistently by refusing to recognize any right of the contractor to payment in virtue of the contract. In my opinion, the majority are in error on each of the questions determined.

ELLIS, J. (dissenting)—An examination of the authorities cited by Judge Main convinces me that the contract here in question should be held void. The fact that it is not void as *ultra vires* of the state to make under any circumstances, seems to me foreign to the issue. Neither was the contract involved in *Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 226, 114 Pac. 457. It is void for the same reason that the contract in the *Green* case was void, namely, because there was no chance for real competitive bidding on the character of pavement for which the contract was let, and hence it contravened public policy as declared by our statute. But the state has received and retains the benefit of the work and material and should pay reasonable value therefor. In such a case, the doctrine of estoppel goes no further. On the authority of *Green v. Okanogan County*, *supra*, the contractor should be remitted to his recovery on a *quantum meruit*. This meets every consideration of "honest dealing," whether by men, municipalities or the state.

I concur with Judge Main.

[No. 13104. Department Two. April 1, 1916.]

ANNA M. DAVISON, *Appellant*, v. COLUMBIA LODGE NO. 8, KNIGHTS OF PYTHIAS, *Respondent*.[1]

EASEMENTS—ESTABLISHMENT—ADVERSE USE — NOTORIETY. There is no right by adverse use to maintain a city service water pipe across the land of another where the same was put down and used without the knowledge of the owner of the land, there being nothing to indicate its presence.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered May 21, 1915, in favor of the defendant, dismissing an action for an injunction, tried to the court. Affirmed.

J. W. Brooks, for appellant.

Rader & Barker, for respondent.

BAUSMAN, J.—One Smith owned a lot fronting upon a city street. The front half he sold to respondent's grantor and, before he sold the rear half to appellant, he laid in the front half a line of pipe from the city water main to the rear half. In the next year he sold this half to appellant. After that sale, his grantee of the front half sold that portion to the respondent. All these conveyances were without mention of the pipe and without reservation concerning it. Except as it may have been visible at the time it was put in, it has ever since been invisible and its use unknown, though, during more than ten years, the appellant occupying the rear half has been using the city water through it.

We do not have to do here with the question of easement by what is called implication of necessity, because it happens that, at slightly increased expense, the occupant of the rear half can obtain service of water through an alley. Nor have we to do with the question of implied grants and implied

[1]Reported in 154 Pac. 383.

reservations, for, at the time of the conveyance to respondent's grantor of the front half, there was no service or pipe to the rear half. Before that time, the original owner of both had been serving his rear half from a pipe in a dwelling upon the front half, which practice, when he sold the rear half, the city forbade, requiring him to install the additional and now contested line. We have, accordingly, to discuss only the rights acquired by adverse user.

As for the period of user, that is long enough, but as to notoriety, the testimony is unanimous that nobody in the line of the servient title ever was aware of this pipe. The first grantee, respondent's grantor, did not occupy the premises before the laying of this direct pipe and never knew of it. Nobody else was aware of it until, in preparing foundations just before the commencement of this suit, the respondent uncovered it. Nor can we attach consequence to the fact that the rear occupant was a public user of water in the city records.

Those who hope to establish rights over other people's lands without contract must establish those claims by such open uses or assertions as give the other party an opportunity or duty to deny them. *Peoples Sav. Bank v. Bufford*, *ante* p. 204, 155 Pac. 1068. Such cases as *Cogswell v. Cogswell*, 81 Wash. 315, 142 Pac. 655, involving easements existing before severance of an estate, have no application here.

Judgment affirmed.

MORRIS, C. J., MAIN, PARKER, and HOLCOMB, JJ., concur.

[No. 13108. Department Two. April 1, 1916.]

IDA M. TRAVIS, *Respondent*, v. ANDREW R. SCHNEBLY, *Appellant*.[1]

TRIAL—INSTRUCTIONS—AS A WHOLE—BREACH OF MARRIAGE PROMISE. In an action for breach of promise of marriage, instructions to the effect that, in case of postponements on account of plaintiff's health, the defendant was in duty bound to wait a reasonable length of time after the last postponement, are not erroneous in failing to state that the postponement must have been mutual, where in earlier instructions the court repeatedly told the jury that the postponements to be considered were those that were consented to by the defendant; since the instructions must be considered as a whole.

BREACH OF MARRIAGE PROMISE — EVIDENCE — SUFFICIENCY. A verdict for $4,000 for breach of marriage promise is not unsupported by the evidence in that it appeared that the plaintiff was afflicted with maladies at the time of the engagement justifying the breach, where there was evidence that she was completely cured by an operation before the time for performance.

Appeal from a judgment of the superior court for Garfield county, Miller, J., entered January 8, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for a breach of promise. Affirmed.

John L. Sharpstein and *Kuykendall & M'Cabe*, for appellant.

John C. Applewhite, *Oscar Cain*, and *John C. Hurspool*, for respondent.

HOLCOMB, J.—This is an action for damages for breach of promise of marriage, and was before us on a former appeal, decided in *Travis v. Schnebly*, 68 Wash. 1, 122 Pac. 316, Ann. Cas. 1913 E. 914, 40 L. R. A. (N. S.) 585. Upon the remand of the case, the pleadings were amended in some particulars, but in substance the same affirmative defenses as formerly were interposed by appellant, and the case was tried upon

[1]Reported in 156 Pac. 400.

substantially the same issues. On the former appeal, the case was reversed because of the lower court's refusal to give defendant's requested instruction number nine, as follows:

"If after plaintiff and defendant became engaged the plaintiff became too ill to enter into the marriage relation, the defendant would not be required to wait an unreasonable length of time for her to recover, and if you find from the evidence that she was thus ill, and the defendant waited as long as was reasonable under all the circumstances for her to recover and she had not recovered, then he had a perfect right to withdraw from the engagement and your verdict should be for the defendant."

The foregoing was given at the second trial as instruction number fourteen. In addition to that instruction, the court also gave an instruction numbered sixteen, as follows:

"Qualifying instructions numbered 11, 12, 13, 14, and 15, you are instructed that if you find that the marriage between the plaintiff and defendant was postponed from time to time on account of the illness of plaintiff, then the defendant would be required to wait a reasonable time after the last postponement for her recovery before breaking his promise of marriage, and if you find that the defendant did not wait a reasonable time after the last postponement was made for the recovery of plaintiff's health before breaking his promise of marriage, if you find that defendant did break the same, he would be liable to plaintiff for damages therefor. It is for you to determine from all the facts and circumstances of this case as to what would constitute a reasonable time, and you are authorized to consider along with all the other facts and circumstances proven on the trial, the length of the engagement, the number of times the marriage was postponed and the condition of plaintiff's health at the time the marriage promise is alleged to have been broken, and from all of these things determine whether or not a reasonable time had transpired after the last postponement of the marriage before the promise of marriage was broken by defendant, if you find that he did break such promise."

It is contended by appellant that the insertion after the words "a reasonable length of time" of the words "after the

last postponement," constituted error in the above and other following instructions excepted to, in that the jury is told that the defendant was in duty bound to wait a reasonable length of time after the last postponement before breaking the engagement, without qualifying the word "postponement" so as to instruct the jury that such postponement must have been mutual. It is argued that, under these instructions, the defendant could be required to wait a lifetime against his will. In the former decision, at page 5, this court used the following language:

"When it became manifest that by reason of poor health she could not marry, postponements were made awaiting her recovery. This constituted a modification of the original contract and imposed upon appellant the duty to wait a reasonable time for her recovery."

This became and was the law of the case, and the trial judge attempted in his instructions to apply the same as the law of the case. We have carefully examined all the instructions upon the subject of postponement by the parties given by the trial judge, and find that, in earlier instructions, particularly five and six, the court repeatedly told the jury that postponements, if any, "consented to by the defendant" were the postponements which were to be considered. We think, therefore, that, in the instruction numbered eleven and following instructions, there was no confusion possible in the minds of the jury, for the idea must have been fully conveyed to them that the postponements to be considered were postponements mutually agreed to or accepted and acquiesced in by the parties. The instructions must be construed as a whole and if, as a whole, they correctly state the law, error cannot be predicated upon a particular part which is amplified and explained by other instructions. *McIlwaine v. Tacoma R. & P. Co.*, 72 Wash. 184, 129 Pac. 1093; *Wainwright v. United States Lumber Co.*, 73 Wash. 222, 131 Pac. 820; *North Bend Lumber Co. v. Chicago, Milwaukee & Puget*

Sound R. Co., 76 Wash. 232, 135 Pac. 1017; *Murray v. Wishkah Boom Co.*, 76 Wash. 605, 137 Pac. 130.

A painstaking examination of all the instructions convinces us that the trial judge carefully instructed the jury upon all the issues raised by the pleadings of both parties, in accordance with the law. There is conflict of evidence in regard to the later postponements, but there is ample evidence to support the contention of the respondent that, after the fall of 1908, there was no postponement of the date of the marriage by her or agreed to by her. Letters from appellant to respondent in January and March, 1909, show that he was then endeavoring to end the engagement. The testimony of respondent is that she did not consent thereto. The theory and position of appellant were fully covered by the court's instructions. There was no error in the giving and refusing of instructions.

It is further contended by appellant that he was justified in breaking his engagement with a woman afflicted with the maladies with which respondent has been afflicted up to at least 1905. The decision of this court on the former appeal is cited to the effect that,

"This is not an action in which a defendant is pleading his own illness as a defense; but one in which, according to his contention, he is called upon to marry an invalid who was a healthy woman when the original contract was made. Under such a state of facts, if proven to the satisfaction of the jury, a defendant should not be held liable for damages."

The appellant then earnestly insists that the evidence in the case does not justify a verdict on behalf of respondent, and that a verdict in the sum of $4,000 clearly indicates that the jury was influenced by passion and prejudice. These matters were presented to the jury upon the facts. Appellant introduced testimony thereon. But the evidence of the respondent is that she was completely cured by an operation and subsequent treatment for the malady with which she suffered in 1905, and that, in the fall of 1908, she was well and

strong. Her testimony is corroborated to some extent and she herself was in the presence of the jury, from which real evidence the jury might derive some inference. There is, therefore, substantial evidence upon which the verdict of the jury could properly rest. Under all the circumstances and conditions shown in the case, we do not consider the verdict excessive.

There is no error. The judgment is affirmed.

MORRIS, C. J., MAIN, and PARKER, JJ., concur.

[No. 13130. Department Two. April 1, 1916.]

HOWARD H. HAMLIN *et al.*, *Respondents*, v. PHILO D. HAMLIN *et al.*, *Appellants*.[1]

PARTITION—ALLOTMENT—AMENDMENT—REPORT OF REFEREES. Under Rem. & Bal. Code, § 847, providing that the court may set aside the report of referees in whole or in part, or appoint new referees, the court has power to set aside the report and to direct a new allotment in a partition suit, and the interlocutory decree whereby the matter was referred is not final but may be amended as to the manner of allotting the property.

SAME—ALLOTMENT—MODE. Upon partition proceedings in which some of the parties were not interested in all the tracts drawn in controversy, a party is entitled to an allotment from the tracts in which he is interested, where such allotment can be made without injustice to the other owners.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered March 13, 1915, in favor of the plaintiffs, confirming the report of referees appointed in an action for partition, after a hearing before the court. Affirmed.

Byers & Byers, for appellants.

Edwin H. Flick (*John A. Frater*, of counsel), for respondents.

[1]Reported in 155 Pac. 393.

PARKER, J.—This action was originally commenced seeking partition of two parcels of real property owned in common by the parties to the action. Two of the defendants, respondents upon this appeal, by their cross-complaint brought into the action two additional parcels of real property and seek partition thereof, together with the two parcels described in the original complaint. No objection is made to this, though it results in some of the parties not having any interest in some of the property involved in the action. Certain of the defendants have appealed from the final decree, rendered in conformity to a majority report of the referees appointed to make partition.

On October 14, 1914, the trial court entered its interlocutory decree determining the respective interests of all the parties in the several parcels, as to which there was no controversy; also determining that the property was capable of equitable division among the parties entitled thereto without sale of any part thereof; and appointed three referees to make such partition and report the same to the court. On October 27, 1914, there was filed in the office of the clerk of the court a report signed by all of the referees, making the partition such that certain of the parties were allotted some of the property in which they had no interest. The referees evidently construed the interlocutory decree as authorizing them to make the partition without taking into consideration the ownership of any particular parcel, so far as awarding such parcel to any particular party to the action was concerned.

On November 10, 1914, certain of the parties to whom property had been allotted in which they had no interest, filed their motion asking for an amendment to the interlocutory decree so that it would in terms direct the referees to allot property to the respective owners in which they have an interest, and in effect protesting against the confirmation of the report of the referees as filed. On November 27, 1914, the court amended its supplemental decree accordingly, and on November 30, 1914, entered its order annulling and set-

ting aside the report of the referees and directing the commissioners to again proceed with the partition in accordance with the amended interlocutory decree. On December 16, 1914, two of the referees made report of partition to the court, wherein they allotted the property to the several owners in accordance with the amended interlocutory decree, allotting property to the several owners in which each of such owners had an interest. One of the referees dissented from this report, filing a separate report. Certain of the parties filed exceptions to the majority report of the referees when the matter came on for final hearing. Decree was rendered in accordance with the majority of the referees on March 18, 1915, from which this appeal is prosecuted.

It is contended by counsel for appellants that the trial court erred in amending its interlocutory decree and setting aside the first report of the referees, exceptions being taken to these rulings at the time. It seems to us that this contention is without merit, in view of the express provision of Rem. & Bal. Code, § 847 (P. C. 81 § 1469), providing that: "The court may confirm or set aside the report in whole or in part, and if necessary appoint new referees." Whatever might be said as to the finality of the interlocutory decree in some respects, such, for instance, as a determination of the interests of the respective parties in the several parcels, it was not final in its direction to the referees as to the manner of allotting the property. Manifestly, no ruling of the court as to the manner of allotting the property to the respective owners is final and beyond recall by the court, except its final decree. Plainly the trial court did not abuse its discretion by directing the allotments to be made, if they could be so equitably made, as provided in the amended interlocutory decree. In the text of 30 Cyc. 257, we read:

"Various equities may exist in favor of a cotenant which are not so absolute in character that they can be enforced against the other cotenants to the prejudice of their rights, but which the commissioners are at liberty to consider and

protect. Indeed, we may now regard them as under the duty of so doing unless their action in favor of one cotenant must operate inequitably to another. Among these are allotting parts to cotenants in possession thereof or who have erected improvements thereon . . ."

This is elementary law and needs no citation of authority at this time to support it. It seems plain to us that the principle which calls for allotting to one tenant that portion of the property which he is in possession of, if such allotment can be made without doing any injustice to the other owners, also calls for the allotment to a party of property in which he has an interest, rather than of property which happens to be drawn into the controversy in which he has no interest. While not directly in point, our decision in *Leake v. Hayes*, 13 Wash. 213, 43 Pac. 48, 52 Am. St. 34, is in harmony with this view. Clearly there was no abuse of the court's discretion in directing the allotments to be so made, in view of the fact that it was thereafter found that they could be equitably so made.

Contention is made that the allottment of the property to the several owners was inequitably made, aside from the refusal of the court to confirm the first report of the referees. Our review of the record convinces us that this contention is wholly without merit.

The final decree of the superior court is affirmed.

MORRIS, C. J., MAIN, HOLCOMB, and CHADWICK, JJ., concur.

[No. 13131. Department Two. April 1, 1916.]

CHARLES M. BARR, *Respondent*, v. KERFOOT INVESTMENT COMPANY, *Appellant*, E. G. KERFOOT *et al.*, *Defendants*.[1]

PAYMENT—EVIDENCE—SUFFICIENCY. Findings that a payment of a balance of $410.82 was not made is sustained by evidence to the effect that the debtor waived a lien in order to allow the creditor to obtain advances from an insurance company, and the creditor paid $10.82 and transferred four shares of capital stock of the par value of $400, agreeing to pay ten per cent interest and retaining an option to buy it back, and upon liquidation of the corporation, substituted four shares in another company under like agreement, reciting that it was held as collateral.

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence, where the trial court heard and saw the witnesses, will not be disturbed on appeal, where the evidence does not preponderate against them.

Appeal from a judgment of the superior court for Franklin county, Linn, J., entered April 22, 1915, upon findings in favor of the plaintiff, in an action to foreclose a lien on corporate stock, tried to the court. Affirmed.

Gerard Ryzek, for appellant.

Chas. W. Johnson, for respondent.

HOLCOMB, J.—This case presents nothing but a question of fact. The statement of facts shows Barr performed services and furnished materials to the Kerfoot Investment Company in the construction of a hotel building, amounting to $1,594.18, and received from time to time in payment sums aggregating $1,183.82, leaving a balance due on December 18, 1912, of $410.82. On that day, as he and his wife (who was also his bookkeeper) testified, he gave, at the request of E. G. Kerfoot, president of the Kerfoot Investment Company, a receipt for $410.82, in order to waive a lien and satisfy

[1]Reported in 156 Pac. 392.

the Continental Insurance Company, which was making a loan on a hotel building to the Kerfoot Investment Company. On the same day, E. G. Kerfoot, of the investment company, delivered to Barr four shares of the stock of the Kerfoot Hardware Company, a corporation, of the par value of $100, and at the same time presented to Barr for execution by him a written agreement to the effect that the Kerfoot Hardware Company agreed to pay Barr interest at the rate of ten per cent per annum on the four shares of stock, and that Barr should sell the stock to the hardware company upon demand at a price not exceeding $100 per share, and that, should Barr desire to sell the stock, he should first offer it to the hardware company. This agreement was signed by the Kerfoot Hardware Company, by E. G. Kerfoot, and by Barr, *as made in duplicate.* On that day the Kerfoot Investment Company paid to Barr, by a check, $10.82, which was credited, leaving a balance of $400, which the Barrs did not at the time discharge on their books.

Later, Kerfoot liquidated the affairs of the hardware company and he and his wife voluntarily offered to, and did, substitute for the hardware company's stock four shares of stock of the Kerfoot Hotel Company, a corporation, of the par value of $100 each, on May 1, 1913, and also presented to Barr an instrument to be, and which was, signed by him, reciting a consideration of one dollar and other valuable considerations, and agreeing to sell to E. G. Kerfoot and Gertrude W. Kerfoot the last mentioned stock, at the price of $100 per share, at any time within five years from date, and not to sell or dispose of the stock to any one else without first offering it to E. G. or G. W. Kerfoot. It was also therein stipulated that, "This stock is held as collateral and bears ten per cent interest per annum. It does not participate in any dividends." This stock was issued directly to Barr by E. G. Kerfoot, as president, and G. W. Kerfoot, as secretary; but, as was said, it was voluntarily substituted by them in lieu of the stock of the Kerfoot Hardware Company and ap-

parently under the same arrangement. E. G. Kerfoot admitted in his testimony that: "The waiver of the lien by Barr was required by the life insurance company. They wouldn't advance money unless I got waivers from every one that done work on the building." This admission, together with the testimony by Barr and wife, is ample to explain and avoid the receipt for $410.82 on December 18, 1912.

The Kerfoots, husband and wife, contended and testified that the original transfer of four shares of hardware company's stock was for the purpose of satisfying in full the balance of $400 remaining due on December 18, 1912; while Barr and wife contended that the stock was delivered merely as collateral for the payment of the $400 then remaining unpaid. If the stock was sold absolutely to Barr in payment of the debt of $400, it is strange that they would, so to speak, "keep any strings" on it, that Barr could not sell it to any one else, and that they would pay ten per cent interest upon it while they stipulated that it should not participate in any dividends; and it is strange, also, that they would feel called upon to substitute for the hardware company's stock, when the hardware company's affairs were liquidated, an equal amount of stock in the Kerfoot Hotel Company and under a similar arrangement. It was also then agreed, upon the substitution of the hotel stock, *that it was held as collateral and that ten per cent interest should be paid upon it, and that it should not be sold to any one else but the Kerfoots.* Barr originally attempted to hold both the Kerfoots personally and the Kerfoot Investment Company for his indebtedness. The trial court very properly held that the Kerfoots could not be held personally for their promise which, as testified to by the Barrs, was made orally, and comes within the statute of frauds, the debt being the debt of the Kerfoot Investment Company or of the Kerfoot Hotel Company.

The trial judge held that there had been no payment of the $400. As to this there is a direct conflict in the evidence between the Kerfoots and the Barrs, and we have con-

sistently held that in such a case a trial court, having the opportunity of viewing the witnesses and their demeanor and credibility, is the better judge of the credibility and of the weight of the evidence, and where the evidence does not preponderate against his finding we will not disturb the same. The trial judge might have decided either way. Having decided in favor of respondents and there being nothing to preponderate against the same, the finding and judgment of the trial court should be sustained.

Affirmed.

MORRIS, C. J., PARKER, and MAIN, JJ., concur.

[No. 13132. Department Two. April 1, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v. ANNIE K. RUSSELL, *Appellant*.[1]

ABORTION—INFORMATION—SUFFICIENCY. An information for abortion need not allege the manner in which the instruments were used.

SAME—EVIDENCE—ADMISSIBILITY. In a prosecution for abortion, the paternity of the child is not in issue, and is properly excluded.

SAME—EVIDENCE—ISSUES—PREGNANCY. Pregnancy is not an issue under Rem. & Bal. Code, § 2448, making it punishable for any person to supply any woman, whether pregnant or not, with any drug or substance or to use any instrument with intent to produce the miscarriage of a woman.

SAME—EVIDENCE—ADMISSIBILITY. In a prosecution for abortion, questions as to why the prosecutrix had not accused or prosecuted the man responsible for her condition are properly excluded.

SAME. In a prosecution for abortion, it is irrelevant that a married witness, accompanying the complaining witness to defendant's office, believed herself pregnant and on the same night her menses returned in the natural way.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. In a prosecution for abortion, it is not reversible error to exclude cross-examination

[1]Reported in 156 Pac. 565.

of the complaining witness as to her voluntary fault to affect her credibility, where she had already admitted voluntary intercourse with this and other men.

Appeal—Preservation of Grounds—Exceptions. Error cannot be predicated on instructions to which no exception was taken.

Criminal Law—Trial—Comment on Evidence. It is not an unlawful comment on the evidence in a prosecution for abortion to warn the jury against consideration of the youth of the female or any question of policy or the wisdom of the prosecution.

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 4, 1915, upon a trial and conviction of abortion. Affirmed.

Wilson R. Gay, for appellant.

Alfred H. Lundin, *W. F. Meier*, and *Joseph A. Barto*, for respondent.

Morris, C. J.—Appeal from a conviction upon an information charging abortion by the use of certain instruments. The first error charges a defect in the information in failing to allege the manner in which the instruments were used. This same error was urged and overruled in *State v. Gaul*, 88 Wash. 295, 152 Pac. 1029, it there being held that the information need not allege the name of the instrument nor the manner of its use. What is said in the *Gaul* case, and the authorities there cited, disposes of this contention, and the information is sustained.

It is next urged that the lower court erred in sustaining an objection to a question propounded the prosecuting witness by appellant asking her to name the man she blamed for her condition. The ruling was correct, the paternity of the child not being an issue. *People v. Wah Hing*, 15 Cal. App. 195, 114 Pac. 416.

Neither is pregnancy an issue under our statute (Rem. & Bal. Code, § 2448; P. C. 135 § 391), which reads as follows:

"Every person who, with intent thereby to produce the miscarriage of a woman, unless the same is necessary to preserve her life or that of the child whereof she is pregnant, shall—

"(1) Prescribe, supply or administer to a woman, whether pregnant or not, or advise or cause her to take any medicine, drug or substance; or

"(2) Use, or cause to be used, any instrument or other means; . . ."

This statute, and similar ones in other states, is substantially derived from the English statute on the same subject. Its proper interpretation, in so far as it is designed to punish an attempt to produce a miscarriage by any of the means mentioned in the statute to any woman, whether pregnant or not, when such attempt is made with an unlawful intent, is given in 1 R. C. L. 77 as follows:

"Prior to the enactment of the English statute which expressly dispensed with the necessity of pregnancy, an earlier statute punished any one who, 'with the intent to procure the miscarriage of any woman,' should administer any medicine, or use any instrument, etc., and it was held that though the woman was not in fact pregnant a conviction could be had. In a number of jurisdictions in the United States similar statutes have been enacted, and the courts have followed the construction placed on the English statute and have held that one who with the intent to procure the miscarriage of a woman administers to her any drug, etc., or uses upon her any instrument, is punishable though the woman is not in fact pregnant."

The same rule is recognized and stated in 1 C. J. 312. This interpretation is sustained without exception in all states having similar statutes. The Massachusetts statute provides that,

"Whoever with intent to procure the miscarriage of a woman, unlawfully administers to her, or advises or prescribes for her, or causes to be taken by her, any poison, drug," etc.

Based upon this statute, the ruling has uniformly been that it was unnecessary either to allege or prove pregnancy. *Commonwealth v. Tibbetts*, 157 Mass. 519, 32 N. E. 910; *Commonwealth v. Follansbee*, 155 Mass. 274, 29 N. E. 471; *Commonwealth v. Taylor*, 132 Mass. 261. The Florida stat-

ute (Rev. Stats., § 2619) is similar to that of Massachusetts, and under it pregnancy is held to be immaterial. *Eggart v. State*, 40 Fla. 527, 25 South. 144. In *Powe v. State*, 48 N. J. L. 34, 2 Atl. 662, under a statute making the attempt to cause a miscarriage in a pregnant woman an essential element of the crime, it was held that the intent, irrespective of the actual knowledge of pregnancy, was the test of the crime.

Appellant's argument in support of this claim of error is based upon citations from states having statutes making pregnancy material. Such cases can have no application under statutes such as ours.

The next assignment of error is based upon the sustaining of objections to questions addressed to the mother of the complaining witness and to a police matron, in which they were asked why they had not accused, arrested or prosecuted the man deemed responsible for the girl's condition. We see no materiality in such testimony, and the ruling was correct.

The next assignment is in sustaining objections to testimony seeking to elicit from a married female cousin of the complaining witness the fact that she believed herself pregnant at the time she accompanied complaining witness to the office of appellant, and that on the same night her menses returned in the natural manner. We can see no relevancy in such testimony.

The next assignment of error is in sustaining objections to the following question asked complaining witness with reference to her relations with the man she believed responsible for her condition: "Now, as a matter of fact, it was you that went to his bed." The girl had already testified that the man was a married man, that the intercourse took place at his home, and that it was voluntarily indulged in on her part. She had further testified that this man was not the only one she had been intimate with, so there was sufficient evidence before the jury to affect the credibility of the witness, if that was what was sought. The evidence was cer-

tainly admissible for no other purpose, and in the light of her previous testimony, we cannot say the refusal to permit an answer to this question was such error as to require a reversal.

Error is urged against two instructions as a comment upon the facts. We find no exception was taken to the first instruction, and further reference to it is unnecessary. The second is as follows:

"Neither should the fact that —— —— may be a young girl or that she may be unmarried have any weight in your deliberations. Whatever views you may entertain as to the policy of this prosecution or as to whether the same be wise or unwise such views cannot affect in any degree the question involved of guilt or innocence. This question is one of fact and depends upon the evidence alone, unaffected by any consideration of policy."

We find nothing objectionable in this instruction.

Other errors are addressed to rulings made subsequent to the trial covering the same points already discussed. They are all without merit.

The judgment is affirmed.

Holcomb, Bausman, Mount, and Parker, JJ., concur.

[No. 13133. Department Two. April 1, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v. HENRY PETERSON, *Appellant*.[1]

CRIMINAL LAW—DEFENSES—INSANITY—DETERMINATION—DISCRETION—ABUSE. In the absence of any statute on the subject, it is discretionary for the trial court to enter upon an examination of an accused person to determine the question of his sanity with a view of determining the right of the state to put him upon trial or enter judgment against him; and it is not an abuse of discretion to refuse a motion for the appointment of a commission for that purpose where the motion was supported only by the verification of counsel that he believed his client to be insane, where the court had the benefit of observations during the trial, at which a jury determined that accused was not insane at the time of the commission of the offense.

SAME—DEFENSES—INSANITY—INQUIRY—STATUTES. Rem. & Bal. Code, § 5953, authorizing the superior court to cause to be brought before it any person who is alleged to be insane and unsafe to be at large, has no application to a person convicted of crime and already in the custody of the court, and does not divest the trial court of its power to exercise its discretion as to an inquiry touching the defendant's sanity.

Appeal from a judgment of the superior court for King county, Ronald, J., entered January 11, 1915, upon a trial and conviction of rape. Affirmed.

Glasgow & Waite, for appellant.

Alfred H. Lundin and *Joseph A. Barto*, for respondent.

PARKER, J.—The defendant, Henry Peterson, was charged by information with an attempt to commit the crime of carnal knowledge of a child. His trial in the superior court resulted in a verdict of "guilty as charged." Thereupon judgment was rendering sentencing him to the penitentiary, from which judgment he has appealed to this court.

On September 21, 1914, this prosecution was commenced by the filing of the information. On September 30, 1914,

[1]Reported in 156 Pac. 542.

appellant being duly arraigned, pleaded "not guilty." On November 16, 1914, counsel for appellant moved the court for the appointment of a commission of physicians to examine appellant as to his sanity, which motion was on that day denied. At the same time, appellant was by the court granted leave to file a plea of insanity, and ordered to file the same immediately. Thereupon counsel for appellant filed a plea of insanity as a defense to the charge, in form substantially as prescribed by Rem. & Bal. Code, § 2174 (P. C. 135 § 1377). On December 22, 1914, the case being called for trial, counsel for appellant again moved the court for the appointment of a commission to examine appellant as to his sanity, which motion was by the court denied, and the trial proceeded, verdict being rendered against appellant the following day. On January 9, 1915, counsel for appellant filed a petition in the case, again making application to the court to have a commission appointed to examine appellant as to his sanity. This petition was verified by counsel to the effect "that he believes defendant to be insane and mentally irresponsible." The prior motions appear to have been made orally. In any event, the record before us does not show them to have been made in writing, nor does the record contain any showing of facts upon which they were based. This last application for the appointment of a commission, and also appellant's motion for new trial, then pending, were denied, and on January 11, 1915, final judgment was rendered against appellant sentencing him to the penitentiary.

The contention made in appellant's behalf principally relied upon by his counsel is, in substance, that the trial court erred in proceeding to trial and final judgment without first causing the question of appellant's sanity to be inquired into and determined by a commission, as applied for by the motions and the petition above noticed. In so far as appellant's alleged insanity had to do with the question of his guilt is concerned, he was amply protected by the plea of insanity filed in his behalf. There was thereby brought before the

jury the question of appellant's insanity at the time of the commission of the offense, and also the question of the continuation of such insanity. That special plea was filed, evidence introduced in support thereof, the jury fully instructed thereon, and proper forms of verdict submitted to the jury, as provided by Rem. & Bal. Code, §§ 2174 and 2175 (P. C. 135 §§ 1377, 1379), as follows:

"When it is desired to interpose the defense of insanity or mental irresponsibility on behalf of one charged with a crime, the defendant, his counsel or other person authorized by law to appear and act for him, shall at the time of pleading to the information or indictment file a plea in writing in addition to the plea or pleas required or permitted by other laws than this, setting up (1) his insanity or mental irresponsibility at the time of the commission of the crime charged, and (2) whether the insanity or mental irresponsibility still exists, or (3) whether the defendant has become sane or mentally responsible between the time of the commission of the crime and the time of the trial. . . .

"If the plea of insanity or mental irresponsibility be interposed, and evidence upon that issue be given, the court shall instruct the jury when giving the charge, that in case a verdict of acquittal of the crime charged be returned, they shall also return special verdicts finding (1) whether the defendant committed the crime and if so, (2) whether they acquit him because of his insanity or mental irresponsibility at the time of its commission, (3) whether the insanity or mental irresponsibility continues and exists at the time of the trial, and (4) whether, if such condition of insanity or mental irresponsibility does not exist at the time of the trial, there is such likelihood of a relapse or recurrence of the insane or mental irresponsible condition, that the defendant is not a safe person to be at large. Forms for the return of the special verdicts shall be submitted to the jury with the forms for the general verdicts."

Counsel for appellant seem to proceed upon the theory that these sections of the statute have to do only with the question of insanity in so far as it relates to the guilt or innocence of the accused, and that they have no relation to insanity of

the accused at the time of trial or judgment as affecting the right of the state to proceed with his trial and render judgment against him. Assuming, for present purposes, that this is a correct view of these sections of the statute, and having in mind the general rule of the common law that an accused person cannot be lawfully tried or have judgment rendered against him while he is insane, as held in *State ex rel. Mackintosh v. Superior Court*, 45 Wash. 248, 88 Pac. 207, we are of the opinion that it is a matter within the discretion of the trial court as to whether or not it will enter upon an examination of the question of the sanity of the accused with a view of determining the right of the state to put him upon trial and render judgment against him. We know of no statute of this state which makes it mandatory upon the trial court to enter upon such an inquiry or to appoint a commission looking to the determination of such a question. In states having statutes authorizing the appointment of such a commission with a view of determining the sanity of an accused person prior to trial or judgment, the statute not being mandatory in terms, the rule seems to be that it is within the discretion of the trial court as to whether or not it will so proceed. In *People v. McElvaine*, 125 N. Y. 596, 26 N. E. 929, the court observed:

"The question raised under similar statutes has been considered in a number of our sister states, and, so far as we are aware, has been uniformly construed to invest the trial court with a discretion to order such examination or not, as it might, from inspection, observation and information, judge to be necessary or expedient. (*Webber v. Commonwealth*, 119 Pa. 223; *Jones v. State*, 13 Alabama 153; *Bonds v. State*, 1 Martin & Yerger [Tenn.]; *State of Iowa v. Arnold*, 12 Iowa 480; *People v. Ah Ying*, 42 Cal. 18.)"

See, also, *State v. Peacock*, 50 N. J. L. 34, 11 Atl. 270; *Granberry v. State*, 184 Ala. 5, 63 South. 975; *People v. Kirby*, 15 Cal. App. 264, 114 Pac. 794; 12 Cyc. 509.

We cannot see that the rule of discretion should be regarded differently in the absence of a statute on the subject.

Some of the above cited authorities so hold. The real question we think then is, Did the learned trial court abuse its discretion in refusing to appoint a commission and enter upon the inquiry as asked by counsel in their motions and petition? There is nothing in the record before us showing any facts upon which the two motions made before trial were rested. The last application, made in the form of a petition, between the time of the rendering of the verdict and the time of the rendering of the final judgment, is supported only by the verification of counsel for appellant to the effect "that he believes said defendant to be insane and mentally irresponsible." It seems quite plain to us that it cannot be said, upon this showing, that the learned trial court abused its discretion in declining to appoint a commission or enter upon an inquiry touching the sanity of appellant at that time. At the time of the filing of the verified petition, the trial judge had the benefit of his own information touching appellant's mental condition, acquired by observation of appellant during the course of the trial and other proceedings when appellant was present in court. We have assumed, for the sake of argument, that in the making of these motions and the filing of this petition, counsel for appellant were in effect asking the court to refrain from putting appellant upon trial or render judgment against him, because of his then insanity, apart from the insanity which was pleaded as a defense and alleged to exist at the time of the commission of the act charged as a crime against him. It seems quite plain to us that the motions and petition did not, and could not, properly bring before the court the question of appellant's insanity for any other purpose.

After the rendering of the verdict and before the rendering of the judgment against appellant, his counsel also filed in the superior court for King county a complaint alleging him to be insane, in the usual form for initiating proceedings looking to commitment to the hospital for the insane of persons who are "unsafe to be at large" by reason of their in-

sanity. Counsel seem to have filed this complaint with a view of presenting the question of appellant's insanity to the court under Rem. & Bal. Code, § 5953 (P. C. 247 § 21), reading in part as follows:

"The superior court of any county in this state, or the judge thereof, upon the application of any person under oath, setting forth that any person, by reason of insanity, is unsafe to be at large, shall cause such person to be brought before him, . . ."

Even though it might be held that, in such a proceeding, the court is required to proceed to a hearing upon the question of insanity so presented, we are of the opinion that the court is not bound to so proceed in a case of this nature, since the accused who is alleged to be insane is already in the custody of the law. The question here presented is not whether appellant shall be restrained of his freedom because he "is unsafe to be at large," but whether he is entitled to have the court refrain from putting him upon trial for a crime or refrain from pronouncing judgment against him because of his insanity. Appellant cannot be withdrawn from the jurisdiction of the court in this criminal prosecution by a proceeding under § 5953, above quoted from. The question of his sanity, we think, remains within the jurisdiction of the court in which the criminal case is pending against him until final judgment is rendered therein, to be determined, if necessary, by the court as incident to the criminal case, whether it be raised by special plea as a defense to the criminal charge, or raised as a bar to putting the accused upon trial or pronouncing judgment against him. We are of the opinion that the attempted commencement of this independent proceeding under § 5953 did not divest the trial court of power to exercise the discretion which we have concluded was not abused in the court's decision that the preliminary showing did not call for an inquiry touching the sanity of appellant.

The only other assignment of error made by counsel for appellant is that "the court erred in denying appellant's motion for a new trial." This assignment is presented to us without any argument or citation of authorities whatever. We feel justified in disposing of it in an equally summary manner by saying that we think it is without merit, in so far as the facts brought to our attention in counsel's statement of the case in their brief disclose. We do not feel that we are called upon to give this assignment further attention.

The judgment is affirmed.

MORRIS, C. J., MOUNT, BAUSMAN, and HOLCOMB, JJ., concur.

[No. 13173. Department One. April 1, 1916.]

FRANK ANDERSON *et al.*, *Appellants*, v. WILLIAM H. HASSELL *et al.*, *Respondents*.[1]

APPEAL—REVIEW—FINDINGS. Findings will not be disturbed unless it can be said that they are not sustained by the preponderance of the evidence.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered April 21, 1915, upon findings in favor of the defendants, in an action on contract, tried to the court. Affirmed.

James O. Cull and *Englehart & Rigg*, for appellants.

Clark & Lockhart and *Oscar Cain*, for respondents.

PER CURIAM.—Appellants are the owners of two tracts of land situated on the Yakima Indian reservation. In order to secure a supply of water for irrigation purposes, they entered into a contract with respondent Hassell for the construction of a cement pipe line which should extend from a main irrigation ditch to appellants' lands lying about a mile to the south of the main ditch.

[1]Reported in 156 Pac. 402.

hundred additional copies, is a "newspaper of general circulation," within Rem. & Bal. Code, § 582, relating to the publication of notice of execution sales.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 9, 1915, in favor of the plaintiff, in an action for a writ of mandamus to compel a sheriff to levy upon and sell certain real property on execution. Affirmed.

Walter B. Allen, for appellant.

Warren H. Lewis, for respondent.

PARKER, J.—The relator, C. W. Lewis, being the owner by assignment of an unsatisfied money judgment rendered in the superior court for King county, sought a writ of mandate from that court requiring the defendant, as sheriff of King county, to levy upon and sell certain real property belonging to the judgment debtor in satisfaction of an execution issued upon that judgment, and specially requiring him to publish notice of such sale in the Rainier Valley Citizen, a newspaper published and circulated in King county. Trial in the superior court resulted in judgment against the defendant as prayed for, from which he has appealed to this court.

The relator, having procured the issuance of an execution, presented it to appellant, as sheriff of King county, and demanded that he proceed as we have above stated. The relator, at the same time, tendered to appellant a sufficient sum to pay all fees and expenses which would be incurred by him in making the levy and sale other than the expense of the publication of notice of sale in a newspaper. In lieu of the money for the publication expense, relator tendered to appellant a receipt showing payment by the relator to the proprietor of the Rainier Valley Citizen of a sum entitling the relator to have such notice of sale published for the time required by law in that paper, so that appellant would be at no expense in making such publication. Appellant refused to proceed as demanded by the relator.

Counsel for appellant contends that the remedy of mandamus is not available to the relator since, if he has been injured, "he has an adequate remedy at law," evidently meaning a right of action for damages against appellant recoverable upon his official bond. Whatever the common law rule may have been, our statute seems to conclusively answer this contention adversely to appellant. Rem. & Bal. Code, § 1014 (P. C. 81 § 1753), relating to the writ of mandamus and prescribing in what cases it may issue, reads:

"It may be issued by any court, except a justice's or a police court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station."

Clearly, if the relator has made proper tender of fees to accrue to appellant and expenses to be incurred by him in making the levy and sale, the duty of the appellant to proceed is a duty especially enjoined upon him resulting from his office of sheriff. The general rule touching the right to invoke mandamus in such cases is well stated in the text of 26 Cyc. 172, as follows:

"In case adequate relief may be had by an action for damages, mandamus will not lie. But in the case of corporations and ministerial officers, there is an exception to the general rule, and they may be compelled to exercise their functions according to law by mandamus, even though the party has another remedy against them by action for neglect of duty. And as a development of this rule it is held by the weight of authority that mandamus will lie, although the party may have also a remedy upon the official bond of a ministerial officer."

This court has rendered several decisions in harmony with this doctrine: *State ex rel. Achey v. Creech*, 18 Wash. 186, 51 Pac. 363; *Achey v. Creech*, 21 Wash. 319, 51 Pac. 208; *Chapin v. Port Angeles*, 31 Wash. 535, 72 Pac. 117; *State ex rel. Hill v. Gardner*, 32 Wash. 550, 73 Pac. 690, 98 Am.

St. 858; *American Bridge Co. v. Wheeler*, 35 Wash. 40, 76 Pac. 534.

Contention is made in appellant's behalf that he has the right, and it is his duty, to determine in what newspaper such notice of sale shall be published, and that such determination is a matter within his discretion. This contention is to be determined by the proper construction of Rem. & Bal. Code, § 582 (P. C. 81 § 925), as applied to the facts appearing from this record. The provisions of that section, so far as we need here notice them, are as follows:

"Before the sale of property under execution, order of sale or decree, notice thereof shall be given as follows:

"(1) In case of personal property, by posting written or printed notice of the time and place of sale . . .

"(2) In case of real property, by posting a similar notice, particularly describing the property . . ., and publishing a copy thereof once a week, consecutively, for the same period, in a newspaper of general circulation published in the county.

"(3) All notices of sales of property on execution or order of sale required by law to be published in any newspaper shall be so published in a newspaper of the county which shall be selected by the sheriff, . . .: Provided, that if the person at whose instance the execution or order of sale is issued, or his attorney, shall present to the sheriff a receipt of the publisher of any newspaper, showing full payment for the publication, then the notice shall be published in that newspaper: . . ."

It seems to us that the concluding language of the above quotation renders it plain that appellant, as sheriff, does not have the power or right of selection of the newspaper in which such publication is to be made, where the person at whose instance the execution is issued has himself provided and paid for the publication in a newspaper so that the sheriff in making the sale is under no obligation to make payment therefor.

It is further contended in this behalf that the Rainier Valley Citizen is not "a newspaper of general circulation pub-

lished in King county." That the paper is published in King county is admitted, but it is denied that it is a newspaper of general circulation therein. A copy of this paper, made a part of the record, shows it to be a seven-column, four-page paper containing general news of such character as to clearly make it a newspaper in the commonly accepted sense. Indeed, in contents and appearance it is a typical country newspaper. The record also shows that it has a weekly circulation among its paid subscribers and advertising patrons in King county of about eight hundred, and about one hundred additional copies are circulated in various other ways each week. If it is not such a newspaper as to its contents and circulation as is contemplated by the provisions of § 582 above quoted, the judgment debtor will have opportunity to be heard upon that question upon the return of the sheriff's sale when confirmation thereof is sought by the relator. Rem. & Bal. Code, § 591 (P. C. 81 § 931). This, however, we think is a question in which appellant as sheriff has no interest, since, as we have seen, the selection of the newspaper in which the notice shall be published lies with "the person at whose instance the execution or order of sale is issued," when the expense of such publication is provided for by such person himself, and properly evidenced to the sheriff, as the relator did in this case.

The judgment is affirmed.

MORRIS, C. J., MAIN, and HOLCOMB, JJ., concur.

[No. 13200. Department Two. April 1, 1916.]

CHARLES W. JOHNSON, *Appellant*, v. PACIFIC POWER & LIGHT COMPANY, *Respondent*.[1]

APPEAL—JURISDICTION—AMOUNT IN CONTROVERSY. Where the complaint alleged and demanded damages in the sum of $201.50, that is the amount in controversy, and the supreme court has jurisdiction on appeal.

WATERS AND WATER COURSES—PRIVATE SUPPLY—DAMAGES—PUBLIC SERVICE COMMISSION—JURISDICTION. The public service commission does not have exclusive jurisdiction, and an action in damages will lie, in case of wrongful acts of a water company in making arbitrary and illegal demands and an unjust enforcement thereof, where the same had nothing to do with discrimination in rates.

Appeal from a judgment of the superior court for Franklin county, Linn, J., entered May 26, 1915, upon sustaining a demurrer to the complaint, dismissing an action for damages. Reversed.

Chas. W. Johnson, for appellant.

John A. Laing and *Driscoll & Leonard*, for respondent.

HOLCOMB, J.—Appellant began his action against the respondent, a public service corporation, for the purpose of recovering damages alleged to have been caused by respondent's shutting off the appellant's supply of water. The complaint, briefly stated, alleges that the minimum charge for water was $1.50 per month, which entitled appellant to 5,000 gallons to be used during any month; that the appellant did not use the 5,000 gallons allowed for the month for which the minimum charge of $1.50 should have been made to him; that the respondent wrongfully charged appellant for 10,987 gallons of water; that appellant tendered the amount due for water used; that the shutting off of the water arbitrarily and without cause damaged the appellant in the sum of $200;

[1]Reported in 156 Pac. 530.

that, further, the appellant was, by coercion and threats, compelled to pay $1.50 in excess of the proper charge. To this complaint, respondent demurred, for the reasons that the court has no jurisdiction and that the complaint does not state facts sufficient to constitute a cause of action. The respondent contends, (1) that plaintiff's complaint does not state a controversy of which this court should take jurisdiction upon appeal; (2) that the subject-matter of this action is within the exclusive jurisdiction of the public service commission.

I. Upon the face of the complaint it appears that appellant demanded damages in the sum of $201.50. The propriety or nature of the measure of damages is not before us. However defective the complaint may be, its allegations are sufficient as against a general demurrer. We know of no way by which we can determine, without going into the facts, that appellant was not actually damaged in some sum which he would be able to prove. The amount in controversy is, therefore, the amount stated in the complaint, and is sufficient to confer appellate jurisdiction upon this court.

II. The lower court seems to have held the view that this is a case for the enforcement of an adjustment of rates as between the appellant and a public service corporation, and that, therefore, the public service commission has exclusive jurisdiction to adjust and determine the matter, and relies upon the case of *State ex rel. Goss v. Metaline Falls Light & Water Co.*, 80 Wash. 652, 141 Pac. 1142. That case, however, was where the relator showed that other persons and property, situated as he and his property were situated, had a certain rate, and that a rate was made for him and his property in excess thereof. There was manifestly discrimination in the rates charged by the public service company. This case is more nearly like that of *State ex rel. Hodgdon v. Hoquiam Water Co.*, 70 Wash. 682, 127 Pac. 304. There counsel for respondent contended that the question involved was one within the exclusive original jurisdiction of the public

service commission, and that, therefore, the superior court was without jurisdiction to determine the question in an action brought originally in that court. It was there said:

"If the question involved only the reasonableness of the amount of the charge which the water company is here seeking to make, this contention might be regarded as sound; . . ."

But it was held otherwise. And in this case the appellant is seeking damages for an alleged wrongful act of the respondent with which the public service commission has nothing to do. In this case, also, there is no charge of any discrimination in rates, but a charge of an arbitrary, unjust, and illegal demand from the respondent and of an unjust method of the enforcement thereof, for an excessive payment for an alleged quantity of water not used by appellant.

The demurrer should have been overruled. The judgment is reversed, and the cause remanded with instructions to overrule the demurrer.

MORRIS, C. J., MAIN, and PARKER, JJ., concur.

[No. 12943. Department One. April 4, 1916.]

JESSE E. DAVIS *et al.*, *Respondents*, v. THOMAS BURKE, *Appellant*.[1]

CARRIERS—CARRIAGE OF PASSENGERS—DEGREE OF CARE. The operator of an elevator being a common carrier of passengers, must exercise the "highest degree of care compatible with practical operation."

SAME—CARRIAGE OF PASSENGERS—ELEVATORS—NEGLIGENCE — INVITATION TO ENTER. Where an elevator door was open and the elevator boy was at his post when a passenger started to enter, there was an invitation to enter, and it was negligence to close the door or start the car before closing the door while the passenger was entering.

SAME—PASSENGER ELEVATORS—NEGLIGENCE—EVIDENCE — QUESTION FOR JURY. Where there was evidence that an elevator boy started to close the door and start an elevator while a passenger was entering, and at the trial contradicted statements made in writing at the time of the trial, negligence in the operation of the elevator is a question for the jury.

SAME—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. Where an elevator was standing at the floor where plaintiff attempted to enter and the door was open, and the elevator boy was at his post, it is proper to instruct to the effect that an intending passenger may assume that he may safely enter without stopping to look, listen or make a special examination.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $5,000, for personal injuries sustained in an elevator accident by a man 38 years of age earning $125 to $200 per month, is not excessive where he received a fracture of the anterior inferior spine of the ilium, a part of the hip bone, of the descending ramus of the pelvis and partial separation of the sacro-iliac joint, and suffered great pain, his injuries were more or less permanent, and he was unable to pursue his former occupation.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered January 30, 1915, upon the verdict of a jury rendered in favor of the plaintiffs, for personal injuries sustained in an elevator accident. Affirmed.

[1]Reported in 156 Pac. 525.

Hughes, McMicken, Dovell & Ramsey and *Alex Dickinson*, for appellant.

John W. Roberts and *George L. Spirk*, for respondents.

MOUNT, J.—The plaintiffs recovered a judgment for five thousand dollars against the defendant on account of personal injuries received by the plaintiff Jesse E. Davis as the result of an elevator accident in the Empire building, an office building in Seattle owned by the defendant. The defendant has appealed from that judgment.

The appellant relies upon four alleged errors which we shall briefly notice in their order. At the close of the plaintiffs' testimony, the court denied a motion for a directed verdict; and after verdict, denied a motion for judgment notwithstanding the verdict. These rulings of the court are alleged as errors. They involve the same question, and that is whether there was sufficient evidence to go to the jury upon the question of the defendant's negligence.

The facts, as testified to by the plaintiffs, are, in substance, as follows: The respondent Jesse E. Davis was occupying an office on the tenth floor of the Empire building on March 21, 1914. There were three elevators in the building. These elevators are located about the middle of the building, on the north side thereof, and faced south upon a hallway which extends east and west through the building.

At about two o'clock in the afternoon of that day, Mr. Davis left his office, intending to take one of the elevators to the street floor. As he came into the principal hallway leading past the elevators, he saw a light burning over the center elevator. This light indicated that the elevator car would stop on its downward trip at that floor. He also discovered at the same time some people a few feet beyond the further elevator. Mr. Davis approached the middle elevator for the purpose of boarding the car. When he came up to the elevator, the door was open, and as he attempted to

step inside, the elevator started as he put his foot upon the floor of the elevator, and he was caught between the top of the door of the elevator and the floor of the corridor, with part of his body in the elevator and part in the corridor; so that when the elevator came down, it caught him on his right side, and crushed him down, and thereby inflicted severe injuries upon him.

When Mr. Davis realized his danger, he shouted to the elevator boy to stop. The latter immediately reversed the lever, bringing the elevator back to the floor of the corridor. Mr. Davis was released upon the threshhold of the elevator door.

Upon cross-examination, Mr. Davis testified, in part, as follows:

"Q. Your statement is that the elevator was at a standstill as you stepped into it; is that correct? A. I believe I stated that I was not positive that the elevator had not started as my foot touched the floor. Q. Well, when you stepped into it, had it started? A. Not to my knowledge. Q. Well, didn't you know? You could see if it were moving? A. It is not as light in there as it might be, and one cannot always tell those things. Q. Oh, well, there was a boy in the elevator, and if the elevator was moving, the boy would have been moving with it? A. Yes, and no such condition existed as indicating the elevator was moving so as to be perceptible. Q. Then to the best of your knowledge the elevator was standing still as you stepped in? A. Yes, sir."

Mr. Davis, on direct examination, testified as follows:

"Q. So far as you know had it (the door) started to close at the time you started to enter the elevator? A. I don't know whether it started before I put my foot on the floor, or whether at exactly the same time."

The boy who was operating the elevator testified, in substance, that he did not see Mr. Davis as he was about to enter the car; that, when the elevator came to a stop on that floor, he looked into the corridor and saw a woman just passing down the stairway at the left, and there was nobody in sight,

and he started to shut the door; that, while the door was closing, he started the elevator down; that there was nobody in front of the elevator car when he started to close the door. He also testified that he was looking to his left before he started the elevator.

In *Atkeson v. Jackson's Estate*, 72 Wash. 233, 130 Pac. 102, 44 L. R. A. (N. S.) 349, we said:

"It must be remembered that in this state the operator of an elevator is a common carrier of passengers, and is held to the degree of care imposed upon common carriers generally; they must exercise with reference to the elevators under their charge the 'highest degree of care compatible with their practical operation.'"

See, also, *Perrault v. Emporium Department Store Co.*, 71 Wash. 523, 128 Pac. 1049; *Edwards v. Burke*, 36 Wash. 107, 78 Pac. 610.

In *Ferrell v. Washington Water Power Co.*, 83 Wash. 319, 145 Pac. 442, we said:

"If we admit that there was no such lurch or jerk as to warrant a recovery, the fact remains that the accident would not have happened if the door had not been opened while the car was in motion. This conclusion is well within the doctrine of *Perrault v. Emporium Department Store Co.*, 71 Wash. 523, 128 Pac. 1049. In that case the elevator had landed about four or five inches below the level of the floor. Plaintiff entered without looking, and fell. Contributory negligence was set up as a defense. The court said: 'The open door, with the elevator boy at his post, was an invitation to enter.'"

The same was true in this case. If the plaintiffs' testimony was correct—that the door was open and the elevator boy was at his post when Mr. Davis started to enter, it was clearly the duty of the boy not to close the door until he had looked to see that no one was about to enter. And it was also his duty not to start the elevator, under the circumstances, until the door was closed. So far as the record shows, no other person was attempting to board the elevator at the time Mr. Davis attempted to enter. It was plainly negli-

gence for the elevator boy to close the door upon a person entering the elevator.

It is argued by the appellant that the elevator boy, for some unexplained reason, contradicted the statements which he had made in writing soon after the accident. Whether his statments made at that time, or at the trial of the case, were correct, was a question for the jury. We are satisfied from a reading of all the evidence that the court did not err in refusing to decide, as a matter of law, that no negligence had been proven; and, for the same reason, did not err in refusing to enter a judgment notwithstanding the verdict.

Upon the trial of the case, the court instructed the jury as follows:

"You are instructed that an elevator for the carriage of persons is not supposed to be a place of danger like a railroad crossing at a highway, which should be approached with great caution; but, on the contrary, when the door is thrown open by the attendant, and the attendant is at his post, it may be assumed by one intending to become a passenger, that it is a place which may be safely entered without stopping to look, listen, or make a special examination."

It is conceded that this instruction is supported by *Perrault v. Emporium Department Store Co.*, and by *Ferrell v. Washington Water Power Co., supra;* but an argument is made that the instruction is not applicable to this case by reason of the fact that, when Mr. Davis saw the red light, which indicated that the elevator was approaching the tenth floor, it was his duty to examine and see what conditions were before attempting to enter the elevator. It is probably correct to say that it is the duty of one about to enter an elevator, or waiting for an elevator, to wait until the door is opened before attempting to enter, and not to attempt to enter the elevator when he knows the door is being closed. But those facts do not appear in this case. The evidence of Mr. Davis was that the elevator was standing at the floor when he attempted to enter; that the door was open.

And that was as much of an examination as he was required to make. We think it was not error to give the instruction, and that it properly stated the law upon the question.

It is next argued that the court erred in refusing to grant a new trial because of an excessive verdict. According to Mr. Davis' testimony, at the time of his injury he was thirty-eight years of age, had a position which guaranteed him $125 per month, and that he had made as much as $200 per month. At the time of the trial, he was earning $115 per month as a bookkeeper. He was unable to pursue his former occupation. The evidence shows, also, that he was seriously injured at the time of the accident. The testimony showed that Mr. Davis received a fracture of the anterior inferior spine of the ilium, a part of the hip bone, and also a fracture of the descending ramus of the left side of the pelvis, together with a partial separation of the sacro-iliac joint. The muscles of his foot, leg, and back were severely injured. Some of the physicians testified that, as a result of the injury, Mr. Davis had suffered great pain, and that the injury would be more or less permanent. Other physicians testified that he would probably recover in time. But there cannot be any doubt that, whether he recovers or not, his suffering was intense for a considerable time and that the injuries will more or less continue. The trial court saw the condition of Mr. Davis at the time of the trial and heard the evidence of the doctors as to the character and extent of the injury and declined to interfere with the verdict. We are not convinced upon the record that the judgment is excessive. We are, therefore, of the opinion that a new trial was properly denied.

We find no error in the record, and the judgment must be affirmed.

MORRIS, C. J., FULLERTON, CHADWICK, and ELLIS, JJ., concur.

[No. 12968. Department One. April 4, 1916.]

THE STATE OF WASHINGTON, *on the Relation of The Town of Bothell, Appellant*, v. S. F. WOODY, *Respondent*.[1]

MUNICIPAL CORPORATIONS—ORDINANCES—VALIDITY—DUTY OF MAYOR — SIGNING ORDINANCES — STATUTES. An ordinance requiring the mayor of the town to sign all ordinances "immediately," and to perform such other duties as may be established by the ordinances of the town, is void as an attempted amendment of the statutes, Rem. & Bal. Code, § 7742, and 3 Id., § 7721, defining the duties of the mayor, under which it is held that it is his duty to sign valid ordinances, and also requiring him to perform such duties as may be established by statute.

MANDAMUS — TO OFFICERS — MINISTERIAL ACTS — USELESS ACTS. While the duty of mayors of towns to sign ordinances is ministerial, mandamus does not lie to compel a mayor to sign an invalid ordinance, as the writ does not issue to require an officer to do a vain and useless thing.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 14, 1915, denying an application for a writ of mandamus to compel a mayor to sign an ordinance, upon overruling a demurrer to the answer. Affirmed.

Chas. M. Fouts and *Milo A. Root*, for appellant.

John W. Roberts and *George L. Spirk*, for respondent.

MOUNT, J.—The only question in this case is whether a mayor of a town of the fourth class may be compelled by mandamus to sign an ordinance passed by the town council. The town council of the town of Bothell, a town of the fourth class, passed an ordinance as follows:

"An ordinance establishing the power of mayor of the town of Bothell, and repealing ordinances in conflict herewith.

"Be it ordained by the council of the town of Bothell:

"That the mayor thereof shall preside at all meetings of the council of said town of Bothell; that said Mayor shall appoint a marshal, police judge and clerk for said town of

[1]Reported in 156 Pac. 534.

Bothell; shall immediately upon presentation sign all ordinances passed by said council, and perform such other duties as may be established by the statutes of the state of Washington or by ordinance of said town of Bothell; shall be the judge on all points of order; provided, however, any member of said council may at any time appeal from the ruling of said mayor, and if sustained by a majority of the council of said town of Bothell, he shall be allowed to proceed; that the mayor shall have neither veto or voting power; and each and every ordinance heretofore enacted in conflict herewith is hereby repealed." Ordinance No. 59.

The mayor of the town refused to sign this ordinance, and this action in mandamus was brought to compel him to do so. The trial court denied the writ upon the ground that the ordinance was invalid, and this appeal followed.

The statute, at Rem. & Bal. Code, § 7742 (P. C. 77 § 409), provides:

"The mayor shall preside over all meetings of the council at which he is present. In his absence, a mayor *pro tempore* may be chosen. The mayor, and in his absence the mayor *pro tempore*, shall sign all warrants drawn on the treasurer, and shall sign all written contracts entered into by said town as such mayor or mayor *pro tempore*. The authority and power of the mayor *pro tempore* shall continue only during the day on which he is chosen. The mayor and mayor *pro tempore* shall have power to administer oaths and affirmations, and take affidavits, and testify (certify) the same under their hands. The mayor or mayor *pro tempore* shall sign all conveyances made by said town, and all instruments which shall require the seal of the town. The mayor is authorized to acknowledge the execution of all instruments executed by said town that require to be acknowledged."

The Laws of 1911, p. 111 (3 Rem. & Bal. Code, § 7721), provide other duties for the mayor.

The statute, at Rem. & Bal. Code, § 7731 (P. C. 77 § 389), provides that the council in towns of the fourth class shall have power:

"(1) To pass ordinances not in conflict with the constitution and laws of this state, or of the United States; . . .

"(17) To make all such ordinances, by-laws, rules, regulations and resolutions not inconsistent with the constitution and laws of the state of Washington, as may be deemed expedient to maintain the peace, good government and welfare of the town and its trade, commerce and manufactures, and to do and perform any and all other acts and things necessary or proper to carry out the provisions of this chapter."

It is contended by the appellant that it is the duty of the mayor to sign this ordinance, and that he has no discretion in the matter. This court held in *State ex rel. Prosser Falls Land & Irr. Co. v. Taylor*, 36 Wash. 607, 79 Pac. 286, that the duty of the mayor is ministerial in regard to signing ordinances, and that he may be compelled to sign ordinances by a writ of mandate. And in *State ex rel. Northern Pac. R. Co. v. Hughes*, 53 Wash. 651, 102 Pac. 758, we said:

"The appellant is the mayor of the town of Sumas, which is a municipal corporation of the fourth class, in Whatcom county. Under the law of this state relating to such towns, the mayors thereof do not possess any veto power as to ordinances passed by the town council; but upon the lawful passage of ordinances by the council, it becomes the duty of the mayor to sign the same."

It is no doubt the rule with reference to valid ordinances which the town council has the right to pass; but this court has not held, and we think no court has held, that the mayor is required to sign an invalid ordinance.

The ordinance above quoted is an attempted amendment of the statute. The statute defining the duties of the mayor, as we have seen above, provides that the mayor shall preside at all meetings of the council at which he is present. This ordinance requires that the mayor shall preside at all meetings of the council. This court has held in the two cases above cited that it is the duty of the mayor to sign valid ordinances passed by the council. This ordinance attempts to require the mayor to sign the same immediately. This ordinance also requires the mayor to perform such other duties as may be established by the statutes of the state of Washington, *or by*

ordinances of said town of Bothell. The statute does not require the mayor to perform duties which may be established by ordinance.

It is probably correct to say that the town council may establish a duty which the mayor may be required to perform; but the town council is not authorized to say that the mayor shall perform all, or such other duties, as may be established by ordinance of the town of Bothell. We think it is plain, from a consideration of this ordinance, that it attempts to amend the statute in regard to the duties of mayor. The duties of mayors of towns of the fourth class are defined by statute, and the town councils of such towns clearly are not authorized to amend such statutes by adding to or taking from the duties therein provided for. This ordinance either attempts to change the statute, or it gives no power or authority to the mayor which he does not already have under the terms of the statute of this state. If it attempts to change his duties, it is void, because the town council has no right to pass an ordinance in conflict with the laws of the state; and if it does not change his duties, then it adds nothing to the statute and is useless; and to require the mayor to sign it would be a vain thing. The writ of mandate will not issue requiring an officer to do a vain or useless act.

We think the trial court was clearly right, and the judgment is therefore affirmed.

MORRIS, C. J., CHADWICK, ELLIS, and FULLERTON, JJ., concur.

[No. 13045. Department One. April 4, 1916.]

E. C. LLOYD *et al.*, *Appellants*, v. N. WILLIAMSON, *Respondent*.[1]

BROKERS—COMPENSATION—ACTIONS—DEFENSES—FRAUD—PARTICIPATION BY PLAINTIFF. Upon an agreement by both parties to an exchange of properties that each should pay his own broker and that the one at fault should pay both, in an action by the brokers against the one at fault, the brokers cannot set up that a contemporaneous secret agreement for a less commission in case of defendant's fault was a fraud upon the other party to the contract, since the brokers were parties to the fraud, and the law will leave them where it finds them.

SAME—COMPENSATION—CONTRACTS—EVIDENCE—ORAL CONDITIONS TO VARY WRITING. In such a case, the contemporaneous secret agreement, being in writing, is properly considered in connection with the other written contract, and without reference to oral conditions.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered January 6, 1915, upon findings in favor of the defendant, in an action to recover brokers' commissions, after a trial to the court. Affirmed.

Voorhees & Canfield, for appellants.

W. E. McCroskey and *F. L. Stotler*, for respondent.

BAUSMAN, J.—Defendant agreed in writing with the Nicholas-Shrock Company to exchange properties. Each party was to pay his own broker, but the one who should fail to complete the transaction was to pay both. Defendant, the one who failed, is sued for the combined commissions. He sets up, though, another writing between himself and both sets of brokers, executed before and yet on the same day with the principal contract, by which paper he was to pay them both only a much smaller sum should he be the one to blame. Against this the plaintiff brokers contend that along with that paper went certain oral conditions which

[1]Reported in 156 Pac. 390.

made it ineffective; and secondly, that, if considered at all, it was a secret fraud on the Nicholas-Shrock Company to which it had not been disclosed.

The lower court rightfully gave judgment only for the smaller sum. If this paper was a fraud on the Shrock company, it is not to be set up by either of the brokers, who were as much secret parties to it as the defendant. On a basis of fraud the court must leave plaintiffs where it finds them. Indeed, they are on their own argument lucky to get anything, for such a fraud might vitiate the principal contract too and deprive them of any commission whatsoever. As to the other ground, we find the lower court clearly right on both the law and the facts in considering this paper without the alleged oral conditions and, in an action between the brokers and the defendant, as proper to be read in conjunction with the principal contract.

Judgment affirmed.

MORRIS, C. J., MOUNT, CHADWICK, and ELLIS, JJ., concur.

[No. 13318. Department One. April 4, 1916.]

JESSE E. SPEAR *et al.*, *Appellants*, v. THE CITY OF BREMERTON, *Respondent*, KITSAP HOTEL INVESTMENT COMPANY *et al.*, *Interveners*.[1]

WATERS AND WATER COURSES—PUBLIC SUPPLY—POWER OF CITY—SURPLUS. A city has power to purchase a water system theretofore established and to dispose of any excess or surplus in the supply to any person within or without the city.

JUDGMENT—CONCLUSIVENESS—PARTIES CONCLUDED. A judgment in an action by a city involving only the power of a city to purchase a water supply system and the price to be paid, is not *res judicata* or a bar to an action by taxpayers to enjoin the issuance of bonds for the purchase; as the city was not bound to proceed if the price was unsatisfactory, and until it did the taxpayers were not interested.

WATERS AND WATER COURSES—PUBLIC SUPPLY — ACQUISITION BY CITY—SALE OF SURPLUS—STATUTES. A city has power to acquire a water system and, after supplying its inhabitants, to dispose of surplus water to another municipality, under Rem. & Bal. Code, § 8005, authorizing such acquisition for the purpose of supplying its inhabitants "and any other persons," and 3 Id., § 8010-6, giving any city owning and operating its plant the right "to dispose of any surplus . . . remaining after the wants of the inhabitants thereof have been supplied."

SAME. The power of a city to dispose of its surplus water after supplying the wants of its inhabitants does not include the power to purchase and maintain a distributing system in another city or acquire the franchise of a water company therefor; since that is not directly or by implication authorized by statute, and the city cannot exercise the functions of such other city or deprive the latter thereof.

MUNICIPAL CORPORATIONS—PUBLIC WORKS—SALE OF BONDS—INTEREST—DISCOUNT. A bond issue to pay for a water works system cannot be sold at a discount of five per cent, ostensibly to cover all commissions, attorney's fees and expenses, but which was in fact a bonus for the benefit of the buyer increasing the rate of interest which the bonds were to bear.

[1]Reported in 156 Pac. 825.

WATERS AND WATER COURSES—PUBLIC SUPPLY—ACQUISITION BY CITY—EXCESS SUPPLY. Where a city purchases an existing water plant, taxpayers cannot complain that the city's present use is only forty per cent of the supply.

Appeal from a judgment of the superior court for Kitsap county, Dykeman, J., entered November 24, 1915, dismissing an action for equitable relief, after a trial to the court. Modified.

A. C. Durham and *Robinson & Robinson*, for appellants.

Marion Garland and *Bryan & Colvin* (*J. W. Bryan*, of counsel), for respondent and interveners.

CHADWICK, J.—This is an action by citizens and taxpayers of the city of Bremerton to restrain the issuance of bonds for the purchase of the Bremerton Water Company's plant. The right of the city to purchase, under certain reservations in the franchise, was established in the case of *Bremerton v. Bremerton Water & Power Co.*, 88 Wash. 362, 153 Pac. 372.

This action is maintained upon the theory that the city is proceeding without power and for that reason the issue should be restrained. A brief resume of the facts is necessary to a complete understanding of the issues and the conclusions we have drawn therefrom. On March 14, 1902, the predecessors of the Garrison-Fisher Company obtained a franchise to construct and maintain a waterworks system in the city of Charleston. On the 7th day of April, 1902, a like franchise was obtained from the city of Bremerton. Since that time, the Garrison-Fisher Company has maintained a water system which supplies the cities of Charleston and Bremerton, the Navy Yard, and outlying territory in the vicinity of the two towns; the proportion of use being, approximately, Bremerton, forty per cent; Charleston, twenty per cent; and the Navy Yard and outlying suburbs, forty per cent.

The supply of water comes from head works which are west of Charleston. The main pipe line runs east through

Charleston, and into the city of Bremerton. The Navy Yard takes its supply at the yard limits. The government owns and maintains its own distributing system. The city of Bremerton proposes to take over the whole plant, and in turn supply the two municipalities and the other customers of the present company as a business enterprise. The trial judge sustained the city in all its contentions.

We shall notice the several assignments of error in their order:

(1) We hold that the city has a right to purchase a water system theretofore established (Rem. & Bal. Code, § 8005; P. C. 77 § 1073), subject to such qualifications as are hereinafter noticed, "and to dispose of any excess or surplus of any such supply to any person within or without the city." Having this power, it is unnecessary to discuss the question of *res judicata* which is based upon the case of *Bremerton v. Bremerton Water & Power Co., supra.* The power to purchase generally, and the price to be paid, were the only questions involved in the former case. The exercise of the power was not involved and not passed upon. Neither were these appellants bound to intervene or otherwise assert their rights as taxpayers in that case under the authority of *Stallcup v. Tacoma*, 13 Wash. 141, 42 Pac. 541, 52 Am. St. 25. They were not bound to speak until it became evident that the city had fixed the purchase price and was proceeding to put a charge upon their property to pay it. In other words, the city was not bound to proceed if the price was not satisfactory. Until it did, the taxpayer had no interest.

(2) It is next contended that the city cannot own a system for the purpose of distributing water outside of its corporate limits, or to another municipality. The case of *Farwell v. Seattle*, 43 Wash. 141, 86 Pac. 217, is relied on to sustain the doctrine that the powers of a municipality cannot be extended beyond the terms or necessary implications of the statute. The power of a city to purchase a water works is given by § 8005 of Rem. & Bal. Code. It reads:

"Any incorporated city or town within the state be, and is hereby, authorized to construct, condemn and purchase, purchase, acquire, add to, maintain, conduct and operate waterworks, within or without its limits, for the purpose of furnishing such city or town and the inhabitants thereof, *and any other persons*, with an ample supply of water for all uses and purposes, public and private, including water power and other power derived therefrom, with full power to regulate and control the use, distribution and price thereof."

It is insisted that the power to supply is limited to the actual inhabitants of the city "*and any other persons;*" that, under the rule of *ejusdem generis*, as declared in *Farwell v. Seattle*, *supra*, the word "persons" means persons within and not without the city. The *Farwell* case was decided under the act of 1890, Ballinger's Code, § 739. Since then, we have the act of 1909, Rem. & Bal. Code, § 8005 (P. C. 77 § 1073), the act of 1911, ch. 111, Laws of 1911, p. 512, § 6 (3 Rem. & Bal. Code, § 8010-6), and the act of 1915, ch. 184, p. 659, § 16.

It seems to have been the purpose of the legislature to make it plain that the surplus of a municipally owned plant could be sold to those outside of a city by the act of 1911, but for some reason, this act was repealed (Laws 1915, ch. 112, p. 318), and the act of 1915, just referred to, was thereafter passed. Section 16 of the later act gives the right in terms, "to dispose of any excess of any such supply to any person within or without such city." The power to sell without such city implies that a sale may be made to those other than the inhabitants thereof. The power to sell implies the power to distribute, and we have no hesitation in holding that the city may sell its surplus to the Navy Yard, and to those living within the unincorporated territory in the vicinity of the corporate limits.

The act of 1915 is attacked upon grounds which, in view of our construction of the other acts, are not necessary to be discussed.

The next question, whether the city of Bremerton can purchase and maintain a distributing system in the city of Charleston, or acquire the franchise heretofore owned by the Bremerton Water Company (Garrison-Fisher Company), is of more consequence. We are of the opinion that it cannot. The power is not within the terms of the several acts to which reference has been had, and it is certainly not within the necessary implications of any of them. The purpose of the law is plain. It is to give a city the power to acquire, by purchase or otherwise, a water system for the benefit of its own inhabitants, and the power, pending a use by its inhabitants, to dispose of any surplus. The power to sell the excess is incidental to the main purpose; that is to say, a city can develop a plant or purchase an existing plant, and whichever its method may be, it can reasonably anticipate the future and develop or purchase more than enough to supply its present needs. The statute does not authorize, even by the remotest implication, one city to take over a distributing system in another city. To supply water to the inhabitants of a city, is a municipal function. It is to be controlled by the city *using* it, and not by the city *selling* it; and notwithstanding it is said that the city of Charleston, through its council, has indorsed this proceeding and waives its reserved rights under the franchise in favor of Bremerton, and notwithstanding the power of Bremerton to sell its *surplus* to the city of Charleston, it cannot invade or take away the power and the duty of the council of Charleston to deal with its own inhabitants directly, and not through the instrumentality of another, in the exercise of every function committed to it by the legislature.

There is another reason why it cannot be so. The city of Bremerton, in its corporate capacity, cannot place itself in an attitude or position where it is bound, in any degree, by contract, express or implied, to exercise a municipal function in another city which might impair its primary duty to

its own inhabitants. Its power is limited to the sale of a surplus or excess. If the time should come when there is no excess or surplus, the inhabitants of the city owning the plant would be entitled to the use of all the water, and those who take the surplus would be cut off. In other words, the purchaser of the surplus or excess would purchase with the statute before him, and would be entitled to receive only the surplus, not a proportionate share. Nor could he compel the selling city to add to the plant or the supply for his benefit; the reason being, as we suggested in the case of *Uhler v. Olympia*, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998, that the statute does not bear the construction that the legislature intended that a city should go into the business of supplying water for profit or as a commercial enterprise, but only for the benefit of its inhabitants who are to be put to no burden other than the payment for and upkeep of the plant, including interest, with such reasonable additions to the system as attention to thrift may dictate.

Another reason—or, rather, an argument in favor of the one reason—is that the streets and alleys of the city of Charleston belong to it. It is charged with the duty of improving them and keeping them in repair. It, and it alone, can regulate and control their use; and to permit another city to maintain, repair, and extend mains throughout the city would rob it of one of its most important functions. Then, too, a sound public policy demands that a city have within its own control its fire hydrants and other means of distributing and controlling the distribution of water in case of fire. It would seem that these were reasons enough. Cases to sustain our holding are not necessary, but one case which is worthy of attention has been cited. The town of Clifton, having power to provide a water system, either by the municipality or by another under contract with it, advertised for bids for a twenty-year franchise. Among several, the city of Newport, having an excess of water over its needs,

was the successful bidder. It was held that a city could not acquire property for any purpose or engage in any kind of business not incidental to its municipal capacity as an agency of the government; that the cost would fall upon the inhabitants of Newport; that no city could so contract as to lead to the imposition of a tax to pay for a water system in another city, and if the enterprise was unsuccessful, the loss would have to be made up by a tax upon property in Newport, which would be a thing clearly beyond the power of the the council to do. *Dyer v. Newport*, 29 Ky. Law 656, 94 S. W. 25. Counsel contend that the case may be distinguished, inasmuch as our statute gives power to acquire and "operate" a water plant outside of the limits of a city. The word operate must be kept in its setting. The statute where the word occurs, Rem. & Bal. Code, § 8005 (P. C. 77 § 1073), is so obviously intended to give power to a city to acquire land and a water supply and maintain head works or a pumping station that we shall not take time to discuss it.

(3) The city entered into a contract with one John E. Price & Company for the sale of the bond issue. The state of the record is fairly stated by the complaint:

"That said defendant has made and entered into a contract for the sale of the said bond issue with John E. Price & Company, whereby the said company agreed to attend to all proceedings necessary in the issuance of said bonds and to take the bonds at a discount of five per cent, which would amount to the sum of $11,250 on the whole issue, said discount to cover all commissions, attorneys fees, and the purchasing sale of said bonds; that said bonds draw six per cent interest";

and the testimony of counsel for the city who had the proceeding in charge:

"Q. Who was to get that eleven thousand five hundred dollars? A. Price & Company. Q. For what purpose were they to be paid $11.500.00? A. It was a discount on the

bonds, that is, it was given to make them a profit on the bonds above the rate the bonds themselves would bear . . ." [S. F. p. 65, line 29.] Q. What was that $11,280.00 for? [S. F. p. 66.] A. It was found by the way that gave a discount on the bonds. By Mr. Durham: Q. What was that, discount? A. That ordinance—or the first ordinance—and I drew it and was a little green in judgment and I drew it with the provision that the bonds ought to sell for par. When Price bid he thought he could get around the law and get the benefit of that discount, so they made that bid that way . . . . Q. What was the negotiations with Price & Co. in regard to the amount of interest the bonds were to draw? A. There is the contract, read it. Q. What was your understanding? A. Interest, I understood they bore six per cent, but they did not put it in writing so what does it amount to . . ."

This is clearly an evasion of the law. We had occasion to say, in *Uhler v. Olympia, supra*, that the taxpayer could not be put to the burden of paying a purchaser of the bonds anything in the way of commission or bonus or for attorney's fees and expenses of printing etc. The duty of the city and the privileges of the buyer are there set out, and we shall not restate them. It may be understood that the law will no longer tolerate the exploitation of the public in the way of taking payment for something for which the taxpayer gets no valuable consideration. The bond, when issued in conformity with existing laws, is a commodity or commercial paper, to be bought at its price or to be let alone. It is not seriously contended that the intended payment is not a discount for the benefit of the buyer—that is, a bonus pure and simple; but it is insisted that, inasmuch as the bonds are to be issued under an ordinance prepared by Price and Company which provides, in terms, that the rate of interest is "not to exceed six per cent," the proceeding is really in harmony with the holding in *Uhler v. Olympia* that bonds shall not bear a rate in excess of six per cent; that the city and the buyer had in mind that decision, and if the bonds are issued

under the ordinance at say, five and three-fourths per cent, the cost, $11,200, including a year's interest, will not exceed six per cent of the total amount of the issue. This is clearly a subterfuge. The law deals only with the interest upon the bonds, not the cost of issuing the bonds. The city has its own counsel and its governing board. The law presumes that they are able to issue a legal obligation without the assistance of others. The statute does not assume to fix a maximum rate of interest and permit the issuance of the bonds at a lesser rate, leaving the difference as a zone for exploitation out of which a city council can give the buyer or broker his commissions, attorney's fees and other expenses.

It is suggested, in a way, that the bond buyers will not take a bond issue unless, by one pretense or another, the bonds can be made to bear a rate higher than that proposed; the buyer in this case saying that such bonds have not found a market unless they draw seven per cent. But we cannot admit that the bond buyer or broker is the only available customer. The state buys municipal bonds without putting an unlawful burden on the taxpayer, and it is not unusual to sell such bonds to the citizens themselves upon a popular subscription. The proposal of the city offends the law, and will not be sanctioned by this court.

(4) The point is made that the city of Bremerton cannot acquire the plant and sell the surplus water because its present use is only forty per cent of the present supply. Whether a city could construct a water system calling for the development and delivery of water to the extent of sixty per cent beyond its present needs, might be questioned. We do not decide the question one way or the other, but it would seem that, where the city purchases an existing plant, it would have the right to take it as it is; otherwise, the object of the statute would be defeated.

Subject to the holding that Bremerton cannot purchase and maintain the distributing system in Charleston, but can only sell of its surplus to be delivered in gross, and that the Price

contract is unlawful and cannot be made a charge upon the system, we hold the bonds to be a valid issue.

To the extent noted, the city will be restrained.

Remanded with instructions to enter a decree accordingly. Appellants will recover their costs.

MORRIS, C. J., MOUNT, and ELLIS, JJ., concur.

[No. 12566. Department One. April 5, 1916.]

ANDREW HANSON *et al.*, *Respondents*, v. NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*.[1]

RAILROADS—RIGHT OF WAY—DUTY TO FENCE—STATUTES. A railroad company is not liable for damages done by trespassing cattle that strayed from its unfenced right of way to and upon the lands of an adjoining landowner, under Rem. & Bal. Code, §§ 8730, 8731, making the killing of stock upon an unfenced railroad right of way *prima facie* evidence of negligence, since "stock killing" statutes have no application to such a case.

ADJOINING LANDOWNERS—DUTY TO FENCE—DAMAGES BY TRESPASSING STOCK—LIABILITY. Under Rem. & Bal. Code, § 4982, changing the common law rule with reference to trespassing animals on unfenced lands, and providing that an owner who would protect his lands from trespass might demand that an adjoining owner join in a partition fence, an owner of unfenced lands cannot recover of an adjoining owner for damages done by trespassing cattle that strayed across their boundary line, where their presence was not known and they were not wilfully turned upon plaintiff's lands.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered October 26, 1914, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages for trespass. Reversed.

Geo. T. Reid and *Miller, Crass & Wilkinson*, for appellant.

McMaster, Hall & Drowley, for respondents.

PER CURIAM.—Respondents own land adjoining the right of way of the appellant. The right of way was not fenced.

[1]Reported in 156 Pac. 553.

Stock wandered from the right of way onto respondents' land, and this action is brought to recover damages which they suffered. The only question is whether a railroad company is liable to an adjoining owner for trespassing stock which wander from its unfenced right of way. Respondents rely upon the statute, Rem. & Bal. Code, §§ 8730, 8731 (P. C. 433 §§ 89, 91). They insist: (a) that these statutes are declaratory of the common law, and in addition declare a rule of evidence; or (b), if a recovery may not be had under the statute, that respondents are entitled to a recovery as upon an action on the case at common law, under the maxim *sic utere tuo ut alienum non laedes.*

The statutes have no bearing on the case. Reference to the original act of 1893, Laws 1893, p. 418, and the acts amendatory thereof, Laws 1903, p. 332, and Laws 1907, p. 169, as well as the cases arising thereunder, will show that the legislature did not assume to do more than make the killing of stock upon an unfenced right of way *prima facie* evidence of negligence. The object of the statute is twofold; to put the burden of proof upon the railroad company where stock is killed upon its right of way, and to protect those who operate and travel upon trains from the hazard of derailment and other accidents.

We find no room for the application of the principles relied on. It is true, as suggested, that the common law assumed to give a remedy for every wrong.

The obligations of those who have adjoining land or land fenced in a common inclosure are noted in *Kobayashi v. Strangeway*, 64 Wash. 36, 116 Pac. 461. It was there held that the owner of land is bound to keep his cattle upon his own lands, and although his lands were fenced with other lands, that he may not allow his cattle to graze or trespass upon the land of the other although within the same inclosure. These are the rules of the common law, and to sustain an action, it must appear that there has been a breach of duty. Appellant owed no duty to respondents to turn cattle which

were trespassing upon its land away from respondents' land. To hold appellant to a liability, it must be made to appear that it knew of the presence of the trespassing cattle, and wilfully turned them upon respondents' land. No such facts appear in this case.

Rem. & Bal. Code, § 4982 (P. C. 183 § 11), seems to have been designed, because of changed conditions, to save the owner from any hardships that the common law rule imposed. It was recognized that, under the conditions prevailing in this country, lands which were subject to cultivation should be fenced, and it was provided that an owner who would protect his lands from trespass might demand of his adjoining proprietor that he join in fencing his land, and failing to do so, an action might be brought for the cost thereof.

It is generally held that "stock killing" statutes are not applicable where stock wander from an unfenced right of way onto the lands of another. The latest expression of this rule is in *Missouri, O & G. R. Co. v. Brown* (Okl.), 148 Pac. 1040, and this we understand to have been the rule declared in *Hubert v. Connell Northern R. Co.*, 71 Wash. 567, 129 Pac. 105, 43 L. R. A. (N. S.) 447, where a number of cases are cited, although it was finally held that the company was liable because it had torn out the fences so that stock might enter. In that case, the right of way and the fields of the plaintiff were a common inclosure. We held, under the facts in the case, that one owner could not throw his neighbor's land out to the commons without doing violence to the maxim relied on.

"For if mine and my neighbor's field are in one inclosure, neither is liable to the other for damage done by trespassing cattle which wander from one ownership to another. But if either myself or my neighbor, in wilful disregard of the rights of the other, break the outer inclosure and leave it open so that cattle may wander at will over the premises belonging to both of us, the offender should be held to the rule that no man may so use his property as to injure that of another."

And further:

"If, for its own purposes or because of its necessities, a railroad company breaks the continuity of the fence so that its common owner is damaged, it is liable; for the proximate cause is not the trespass of wandering stock, but the wilful disregard of the right of another by the party charged."

Respondents are without remedy. The judgment of the lower court is reversed, and the case remanded with instructions to dismiss.

[No. 12948. Department One. April 5, 1916.]

J. FALCO, *as Olympic Ice & Machinery Company, Respondent*, v. A. BLODGETT *et al., Appellants*.[1]

APPEAL—REVIEW—FINDINGS. In the absence of a preponderance of evidence against the findings, they will not be disturbed on appeal.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered February 10, 1915, upon findings in favor of the plaintiff, in an action to foreclose a mechanics' lien, after a trial to the court on the merits. Affirmed.

Hayden & Langhorne and *Fitch, Jacobs & Arntson*, for appellants.

S. F. McAnally, for respondent.

ELLIS, J.—This is an action for the balance due on a contract for the construction, furnishing, and installation of machinery for an ice and cold storage plant, at Puyallup, and for extra materials and work claimed by the plaintiff to have been furnished and performed under agreement with the defendants, and to foreclose a mechanics' lien on the plant. After a long trial, in which many witnesses were examined

[1]Reported in 156 Pac. 407.

and testified at tedious length, resulting in a statement of facts consisting of near thirteen hundred typewritten pages, and abstracts of over three hundred pages, the court made exhaustive findings of fact, and upon appropriate conclusions of law, entered judgment in favor of the plaintiff for the sum of $2,167 and costs, and decreed a foreclosure of the plaintiff's lien. Defendants appeal.

Every question presented is a question of fact. We have read the abstracts with the utmost care, frequently resorting to the statement of facts. We have collected and digested the evidence with reference to each separate assignment of error and as bearing upon each of the court's findings. It presents a sharp conflict on every question. It is obviously impracticable to discuss this mass of conflicting evidence, deduction, and opinion within reasonable limits. The hearing here is a trial *de novo* upon the record in which we are not bound by the findings of the lower court and we have laboriously so treated it. We are impressed with the patience with which the trial court has heard this case, and we are satisfied that his findings throughout are sustained by ample evidence. There is no preponderance against any of them. In such a case, we have so frequently and uniformly held that we will not disturb the findings that citation of authority to the point is unnecessary.

The judgment is affirmed.

MORRIS, C. J., MOUNT, CHADWICK, and FULLERTON, JJ., concur.

[No. 13064. Department One. April 5, 1916.]

MARGUERITE ERFURTH, *Respondent*, v. FRANK ERFURTH, *Appellant*.[1]

HUSBAND AND WIFE — COMMUNITY PROPERTY — CONVEYANCE BETWEEN—GOOD FAITH—BURDEN OF PROOF—STATUTES. Rem. & Bal. Code, § 5292, providing that, when any question arises as to the good faith of any transaction between husband and wife, the burden shall be upon the party asserting the good faith, has reference only to creditors as holders of existing equities, and does not apply in actions between husband and wife; since the same must be construed as *in pari materia* with Id., § 8766, providing that every deed from husband to wife shall operate to divest the real estate from any and every claim or demand as community property, and vest the same in the grantee as separate property; as the latter section is particular in its terms, and the former general.

SAME—ACTIONS BETWEEN—CONVEYANCES — PRESUMPTION OF GOOD FAITH—BURDEN OF PROOF. In an action by a wife to remove the cloud of a community property claim filed by the husband, after having quitclaimed the property to her, the deed being admitted, the burden is upon the defendant to overcome the effect of the deed, as the same is entitled to the presumption of good faith.

EVIDENCE—PAROL EVIDENCE TO VARY WRITING—DEEDS — LIMITATIONS—CONSIDERATION. A quitclaim deed from husband to wife, absolute on its face, cannot be shown by parol to have been made in consideration of an oral agreement that the grantee should hold the premises as a home for the parties and make a will devising the same to the grantor; since it would engraft upon the deed a reservation or limitation at variance with the grant, which cannot be done by parol; nor under the guise of proving a consideration.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered April 16, 1915, upon findings in favor of the plaintiff, in an action to quiet title, after a trial to the court. Affirmed.

D. R. Glasgow, for appellant.

Edmond J. Farley, for respondent.

[1]Reported in 156 Pac. 523.

ELLIS, J.—Action by a wife to remove the cloud cast upon her title to real estate by the filing of a claim of community interest therein by her husband. The parties intermarried August 10, 1911. While the husband held the property in question under contract at the time of the marriage, the evidence shows that it and the improvements thereon were paid for with community funds. On September 6, 1912, defendant executed and delivered to plaintiff a quitclaim deed of the property, which was thereafter recorded. For about two years, the parties occupied the property as husband and wife. In September, 1914, they became estranged and separated. The deed in question recites a consideration of one dollar and other valuable consideration, and is an ordinary quitclaim deed, absolute upon its face, and contains no reservation or limitation whatever. Shortly after the separation, the defendant, pursuant to the provisions of Rem. & Bal. Code, § 8772 (P. C. 95 § 59), filed a notice of claim of community interest in the property. Plaintiff, proceeding under Rem. & Bal. Code, § 8773 (P. C. 95 § 61), which declares that such notice shall be deemed a cloud upon the title, brought this action to remove the cloud, alleging, in substance, the foregoing facts. Defendant answered, admitting the execution of the deed, and seeking by cross-complaint to annul it upon the grounds, first, that, with design to defraud defendant, plaintiff stated that, if he would make the deed to her, she would make a will devising the premises in question to him; that she did make the will, but has repudiated it; that, as an inducement to the deed, she represented that it would not become operative until defendant's death; but that, about the first of August, 1914, she refused to live with him or to permit him to occupy the premises with her; that he executed the deed relying upon these promises and that the consideration has failed.

The plaintiff, by reply, admitted the execution of the deed, but traversed the other allegations of the answer. The deed was admitted in evidence, the filing of the notice of community

interest was admitted, and plaintiff rested. The court, being of the opinion that Rem. & Bal. Code, § 5292 (P. C. 95 § 3), does not cast upon the wife the burden of showing the good faith of transactions as between herself and husband, held that the evidence adduced was sufficient to put defendant to his proofs. Plaintiff thereupon challenged the sufficiency of the cross-complaint to admit of proof as against the deed absolute on its face, which challenge was denied. Defendant, over objection, introduced evidence tending to support the allegations of his cross-complaint in all particulars save the revocation of the will, concerning which there is no evidence. The court sustained a challenge to defendant's evidence and found that the property in question is the separate property of the plaintiff and that defendant has no right, title or interest therein. Decree went accordingly. Defendant appeals.

It is first asserted that the court erred in holding that the burden of proof was not upon respondent to establish the good faith of the transfer of the property. Appellant relies upon Rem. & Bal. Code, § 5292 (P. C. 95 § 3), which provides that, where any question arises as to the good faith of any transaction between husband and wife, the burden of proof shall be upon the party asserting the good faith. That section, however, must be construed in connection with Rem. & Bal. Code, § 8766 (P. C. 95 § 47), a statute in *pari materia*, which declares:

"A husband may give, grant, sell, or convey directly to his wife . . . his . . . community right, title, interest, or estate in all or any portion of their community real property. And every deed from husband to wife . . . shall operate to divest the real estate therein recited from any or every claim or demand as community property, and shall vest the same in the grantee as separate property. . . . Provided, however, that the conveyances or transfers hereby authorized shall not affect any existing equity in favor of creditors of the grantor at the time of such transfer, gift, or conveyance."

The first section, being general in terms, and the last, particular, we are clear that the first has no application where the controversy arises between husband and wife as to the effect of a deed from one to the other. In *Shorett v. Signor*, 58 Wash. 89, 107 Pac. 1033, we held that, under § 8766, above quoted, the legal effect of a deed from one member of the marital community to the other is to vest in such other an absolute title as separate property. The terms of the statute seem too clear to admit of any other construction. In *Smith v. Weed*, 75 Wash. 452, 134 Pac. 1070, we held that the good faith of such a conveyance is open to question only by creditors as holders of existing equities. Where a third party questions the good faith of such a conveyance, the burden of proof is upon the party asserting its good faith; but as between husband and wife, as in other cases, the deed is entitled to the same presumptions of good faith which are indulged in favor of other conveyances. The court committed no error in holding that the burden was upon the appellant in this instance.

It is next claimed that the court erred in sustaining respondent's challenge to the sufficiency of appellant's evidence. The cross-complaint, as we have seen, alleged, in substance, that the consideration for the deed was that respondent would hold the premises as a home for the parties and would make a will devising the property to appellant. We shall assume that the evidence, which was admitted over the respondent's objection, was sufficient to establish these claims. It was, however, inadmissible as against the express terms of the deed, which was absolute on its face. While it is competent to prove an additional or different consideration from that mentioned in a deed, this can never be done where the consideration which it is sought to prove would change or defeat the legal operation of the grant. The consideration here asserted would engraft upon the deed, absolute on its face, a reservation or limitation upon the estate granted through an oral agreement contradictory of, and at total variance with,

the language of the written instrument. This may not be done. *Hubenthal v. Spokane & Inland R. Co.*, 43 Wash. 677, 86 Pac. 955; *Smith Sand & Gravel Co. v. Corbin*, 81 Wash. 494, 142 Pac. 1163; *Union Machinery & Supply Co. v. Darnell*, 89 Wash. 226, 154 Pac. 183; 17 Cyc. 620.

"A condition is a qualification or restriction annexed to a conveyance, and so united with it in the deed as to qualify or restrain it. It cannot, however, be created by parol if the deed is absolute in its terms." 2 Washburn, Real Property (5th ed.), p. 2.

Nor can this be done under the guise of proving a consideration. *Kingsland v. Haines*, 62 App. Div. 146, 70 N. Y. Supp. 873; *Adams v. Watkins*, 103 Mich. 431, 61 N. W. 774; *Feeney v. Howard*, 79 Cal. 525, 21 Pac. 984, 12 Am. St. 162, 4 L. R. A. 826; *Anderson v. Continental Ins. Co.*, 112 Ga. 532, 37 S. E. 766; *Walter v. Dearing* (Tex. Civ. App.), 65 S. W. 380; *Kahn v. Kahn*, 94 Tex. 114, 58 S. W. 825; *Jackson v. Chicago, St. P. & K. C. R. Co.*, 54 Mo. App. 636.

The judgment is affirmed.

MORRIS, C. J., MOUNT, CHADWICK, and FULLERTON, JJ., concur.

[No. 13178. Department Two. April 5, 1916.]

ANNA S. BONNEVIERE, *Appellant*, v. THOMAS B. COLE, *Respondent*, H. H. BRADLEE *et al.*, *Defendants*.[1]

CHATTEL MORTGAGES—PRIORITIES—RECORDING—REQUISITES — STATUTES. Under Rem. & Bal. Code, §§ 3661, 3668, requiring chattel mortgages to be recorded or indexed in books kept exclusively for that purpose, and § 3662, providing that such recording or indexing shall be full and sufficient notice to all the world, constructive notice of a prior incumbrance is not given by the filing and recording of an instrument in the Bill of Sale records which, on its face, was in form an absolute bill of sale but had attached an affidavit of good faith by the grantors, designated as mortgagors, as required of chattel mortgages; such instrument not having been recorded within ten days as required of bills of sale by Id., § 5291.

FRAUDULENT CONVEYANCES—SALES—RECORDING—VALIDITY—SUBSEQUENT CREDITORS—EQUITY—ESTOPPEL — LACHES. Although the failure to record a bill of sale of property remaining in the possession of the vendor within ten days, as required by Rem. & Bal. Code, § 5291, only invalidates the sale as to existing creditors, a vendee who fails to record his bill of sale for fourteen months, leaving the property in the possession of the vendors, who with intent to defraud thereafter mortgaged the same to the plaintiff without notice of the prior bill of sale, is estopped by his own fault and laches to assert a superior title under the bill of sale or under a subsequent oral sale without change of possession; upon the principle of equity that the one of two persons who enables a third person to commit a fraud must suffer the loss.

SAME—"SUBSEQUENT PURCHASERS"—CHATTEL MORTGAGE. In such a case, the subsequent mortgagee is a subsequent purchaser within the meaning of the recording or registration act.

CHATTEL MORTGAGES—DESCRIPTION—PRIORITIES—WAIVER OF LIEN. A description in a chattel mortgage which is good as between the parties is good as against a prior vendee or mortgagee who, by his own fault and laches in failing to properly record his instrument, lost his title as against subsequent purchasers or incumbrancers.

SAME—DESCRIPTION OF PROPERTY—SUFFICIENCY. As between a mortgagor and mortgagee, a description in a chattel mortgage of "all household furniture, furnishings and personal effects, being all the property of like description located at that place or belonging to the parties of the first part," and stated as located in a certain

[1]Reported in 156 Pac. 527.

warehouse in the city of B., is sufficient to include furniture, furnishings and personal effects of the mortgagors located at their residence in B., it appearing that it was crated and ready to be removed to the warehouse, and there being in fact no furniture at the warehouse, but only a few boxes and trunks of articles of small value; a particular description of the location not being essential where it can be located in the county.

Appeal from a judgment of the superior court for Whatcom county, Pemberton, J., entered June 7, 1915, upon findings in favor of the defendant, in an action to foreclose a chattel mortgage, after a trial to the court. Affirmed.

Chas. A. Sather and *Bixby & Nightingale*, for appellant.

Hadley & Abbott, for respondent.

HOLCOMB, J.—On October 8, 1914, defendants Bradlee gave a chattel mortgage to appellant to secure a loan made to them that day and evidenced by their promissory note, upon "the following described personal property now located and kept at Bellingham Truck Company's warehouse in the city of Bellingham, in the county of Whatcom and state of Washington, to wit: Household furniture, furnishings and personal effects, and being all the property of like description located at that place or belonging to said parties of the first part." The mortgage was filed and indexed in the office of the county auditor of Whatcom county on October 6, 1914.

Only a part of the household furniture, furnishings, personal effects and property of like description was, at the time of the execution and delivery of the chattel mortgage, in the warehouse named, the remainder and by far the greater portion being then situated in the house where the mortgagors resided, at 606 Forest street, Bellingham; but it was represented that it was crated ready to remove, and it was then understood that all of it would be removed and left at the designated warehouse during the life of the mortgage.

On the same day, and pursuant to agreement between the mortgagors and appellant, a policy of fire insurance upon

the same household goods, furnishings and personal effects, at 606 Forest street, was issued to mortgagors, "loss if any payable to Anna S. Bonneviere, first mortgagee, as interest may appear." There can be no doubt, under the evidence, but that appellant understood and believed, when she agreed to make the loan and accept the chattel mortgage, that she was to receive as security all the household furniture, furnishings and personal effects that had been located at the residence of the Bradlees, 606 Forest street, Bellingham. The chattel mortgage was in good and sufficient form in all respects except as to the generality of the description of the property.

On June 30, 1913, the Bradlees had made, executed, and delivered to respondent Cole, for a stated consideration of $3,500, an instrument on its face in form an absolute bill of sale, denominated a bill of sale, but having also attached an affidavit of good faith by the grantors, designated therein as mortgagors, as required of chattel mortgages. This instrument was not filed for record until September 1, 1914, more than fourteen months after its execution, and was then filed at the request of Cole and recorded in Bill of Sale records in the office of the county auditor of Whatcom county, and was never filed and indexed as a chattel mortgage. This instrument described the property as "all household furniture of every description now in house occupied by us [grantors] number 606 Forest St.," with other office furniture, and also referred to an inventory attached to it enumerating each item thereof in detail.

On September 18, 1914, the Bradlees made an oral sale or transfer of the property to Cole for the purpose of satisfying their debt of $3,500 to him, but the note was neither canceled nor surrendered, nor was any release of the bill of sale on the records made by respondent, nor was there any change of the possession of the chattels made until October 5, 1914, when respondent took possession and removed the chattels. Immediately thereafter, appellant demanded pay-

ment of her note at the bank where payable, demanded possession of the chattels of respondent, which was refused, and began her action. The Bradlees left the state on the 5th or 6th of October, 1914. When appellant filed her mortgage, she was informed for the first time, by the county auditor, of respondent's recorded bill of sale, but this was after her rights under the mortgage, if any, were acquired.

There is and can be no question but that appellant's mortgage was in good faith and without actual notice of any other valid chattel mortgage against the property. Respondent's bill of sale or chattel mortgage was not filed as a chattel mortgage, and our statutes, Rem. & Bal. Code, §§ 3661, 3668 (P. C. 349 §§ 41, 5), provide that: "Every such instrument . . . shall be filed in the office of the county auditor of the county in which the mortgaged property is situated, . . . and such auditor . . . shall enter in a suitable book . . . with appropriate head: 'The time of filing,' 'Name of mortgagor,' 'Name of mortgagee,' 'Date of instrument,' 'Amount secured,' 'When due,' and 'Date of release.'" Section 3662 (P. C. 349 § 43) provides: "Every mortgage filed and indexed in pursuance of this act shall be held and considered to be full and sufficient notice to all the world, of the existence and conditions thereof," etc.

The purpose of the registration statute is to give notice to subsequent purchasers or mortgagees, though the purpose is attained when subsequent purchasers or incumbrancers have actual knowledge of the existence of the prior incumbrance, though unrecorded, or not at the proper time, or in the proper place. *Darland v. Levins*, 1 Wash. 582, 20 Pac. 809. In the present instance, appellant had neither actual nor constructive knowledge of the existence of respondent's prior mortgage. She could go to the place of registration of such instrument and find the registration or indexing of no chattel mortgage from the Bradlees to Cole, which is the only method of ascertaining by the public records if such an instrument exists. Under §§ 3661, 3668, chattel mortgages

must be recorded or indexed in books kept exclusively for that purpose, and the inclusion of chattels in a real estate mortgage and the recording of such instrument in the records of real estate mortgages does not afford constructive notice of any lien upon the personal property and is void as to subsequent creditors. *Dunsmuir v. Port Angeles Gas etc. Co.*, 24 Wash. 104, 63 Pac. 1095; *Manhattan Trust Co. v. Seattle Coal & Iron Co.*, 16 Wash. 499, 48 Pac. 333, 737; *Radebaugh v. Tacoma & Puyallup R. Co.*, 8 Wash. 570, 36 Pac. 460.

Respondent, however, does not rely upon the filed instrument as either a chattel mortgage or as an absolute bill of sale, but relies on the oral transfer of September 18, 1914, at which time the debt of appellant did not exist. We have held that the statute (Rem. & Bal. Code, § 5291; P. C. 203 § 7) providing that no bill of sale for the transfer of personal property shall be valid as to existing creditors where the property remains in the possession of the vendor, unless the same is recorded within ten days after such sale be made, has no application where no debt of third parties existed at the time the sale or gift was made. *Greenwood v. Corbin*, 48 Wash. 357, 93 Pac. 433. Upon this respondent relies. In that case, however, the apparent possession of the chattels was as much in the appellant as in his father, against whom an execution had been issued and the property in question seized as the father's. The decision in that case, under the facts, was undoubtedly just and correct. But there is another principle involved, the well established principle of equity that "when one of two persons must suffer by the fraud of a third, the loss shall fall upon him who has enabled such third person to do the wrong." *Orillia Lumber Co. v. Chicago, Milwaukee & Puget Sound R. Co.*, 84 Wash. 362, 146 Pac. 850; *Hall v. Hinks*, 21 Md. 406.

It cannot be doubted that, in this case, the Bradlees deliberately planned to defraud one or the other of these two parties. Who enabled them to do the wrong? If, as the tes-

timony of respondent, uncontradicted, shows, on September 18, 1914, he demanded of and received from the Bradlees the transfer of the chattels in their possession for the satisfaction of his very large debt, he could and should have also taken exclusive possession and control of the property, and not left them in exclusive possession and apparent ownership thereof. While in such possession and control, the Bradlees borrowed the money from appellant and offered and gave the same chattels in security therefor. In such position of affairs, we cannot say otherwise than that, but for respondent's own laches and neglect, appellant would not have loaned her money and the mortgage to her would, as matter of course, not have been given.

"Where a bill of sale of personal property absolute in form was intended as security for a debt, and was honest and valid when executed and delivered, authorizing the vendee to take possession to secure his debt, *and he did so before the rights of other persons intervened*, he acquired title, which related back for its validity to the date of the instrument." *Coggan v. Ward*, 215 Mass. 13, 102 N. E. 336 (Syllabus).

Appellant, as a mortgagee, is a subsequent purchaser, within the meaning of the recording or registration act, to the extent of her claim. *Manny & Co. v. Woods*, 33 Iowa 265; *Plaisted v. Holmes*, 58 N. H. 619; *Hinchman v. Point Defiance R. Co.*, 14 Wash. 349, 44 Pac. 867.

The more serious matter to consider is that of the description of the property in appellant's chattel mortgage. Respondent contends that, by the very description, the property mortgaged consisted only of those chattels then in the warehouse, and that thereby appellant had notice that none of the chattels situated in the house of the Bradlees were intended to be mortgaged; and further, that parol evidence is not admissible to explain, add to, or alter the language of the instrument itself. Appellant, to the contrary, asserts that the mortgage was valid and sufficient as between the parties thereto to cover all the household furniture, furnish-

ings, and personal effects of the mortgagors within Whatcom county or owned by the mortgagors, as expressed in the mortgage, if situated in the county of their residence, and that the maxim *Falsa demonstratio non nocet cum de corpore constat*" (a false description does not vitiate) as between the parties, applies. If, as we hold, respondent had, by his own fault and laches lost his title to the chattels in so far as subsequent purchasers or incumbrancers were concerned, we have only to determine whether the description would be good as between the parties to the mortgage. If the description is insufficient as between the parties, it is so because of uncertainty of means of identification.

All descriptions must be construed in view of the general principle that the law presumes that the mortgagor intended to confer some benefit on the mortgagee. A statement as to the location of the chattels mortgaged is one of the most important elements in the description; still, as location serves only as an element or feature of identification, its omission is not necessarily fatal if the property is otherwise sufficiently described. 5 R. C. L. 424.

In *Jones v. Workman*, 65 Wis. 269, 27 N. W. 158, a horse was mortgaged; it was described sufficiently and its location was described as in De Pere, when in fact it was at Janesville. The court held that this erroneous statement did not vitiate the mortgage, the horse being otherwise sufficiently described, and that the maxim *Falsa demonstratio non nocet* applied.

In *Adamson v. Petersen*, 35 Minn. 529, 29 N. W. 321, a chattel mortgage of "all that certain stock of one-inch seasoned lumber, being one carload of about 12,000 feet," and further describing the property as being at a particular place in the city of M., it was held, may, as between the parties or as to a subsequent purchaser with notice, or a stranger, be shown by evidence to be applicable to a car load of such lumber standing at a different place in the city from that named in the mortgage.

As between the mortgagor and mortgagee of personal chattels, a specific and particular description of the several articles mortgaged by which to identify them from other like articles of the mortgagor in the same collection is not essential to the validity of the mortgage. *Leighton v. Stuart*, 19 Neb. 546, 26 N. W. 198.

In the present case, the property described as "the following described personal property now located and kept at Bellingham Truck Company's warehouse in the city of Bellingham, . . . to wit, household furniture, furnishings and personal effects, and being all the property of like description located at that place, or belonging to said parties of the first part," is erroneous for the reason, as shown by the evidence and an inventory made by respondent, that nearly all the furniture was in the house at 606 Forest street, Bellingham, and only four trunks and six boxes "containing a miscellaneous assortment of pillows, blankets, china, curtain hangings, kitchen utensils, and electrical fixtures, in all worth about $25," were at the warehouse. No furniture was at the warehouse. So it is forcefully contended by respondent that the mortgage must be confined to the chattels located in the warehouse which were owned by the mortgagors. But we can omit the location description of the warehouse, and locate the furniture, furnishings and personal effects belonging to the mortgagors at the residence in Whatcom county, and thereby give effect to the contract (*Pettis v. Kellogg*, 7 Cush. 456), which is all the certainty that is required as between the mortgagors and mortgagee. Respondent is not, under the conditions shown, a prior incumbrancer, nor is he a subsequent purchaser. We have only to deal with the validity of the mortgage as affecting the parties thereto. We consider it to be a valid mortgage as to the parties to it.

This case is one arising in equity and appealing peculiarly to equitable principles. We think appellant should recover on her mortgage against the furniture, furnishings and personal effects of the mortgagors which were located in the

house at 606 Forest street, Bellingham, and seized by respondent, as well as the property situated in the warehouse. It is so ordered.

Judgment reversed.

MORRIS, C. J., PARKER, and MAIN, JJ., concur.

[No. 13227. Department One. April 5, 1916.]

H. R. MANN, *Appellant*, v. E. H. BECKER *et al.*, *Respondents*.[1]

INJUNCTION—ORDER—QUASHING SERVICE—SCOPE. Where, on a special appearance to quash the service of a temporary restraining order, the court entered an order that "said writ and the service thereof is hereby quashed," but fixed a new return date, the effect of the order was to quash the service only and not the writ.

SAME—WRONGFUL INJUNCTION—ACTION ON BOND—VOLUNTARY DISMISSAL—EFFECT. The voluntary dismissal of a suit for an injunction, on the specific ground of cessation of necessity for injunctive relief, is not the equivalent of a final decision that the plaintiff was not entitled to the order so as to warrant recovery upon the injunction bond.

SAME—ACTION ON INJUNCTION BOND—DAMAGES—ATTORNEY'S FEES. Where no motion was made for the dissolution of an injunction wrongfully sued out, nor any attack on the merits of the injunction, but only a special appearance attacking the service of the writ, attorney's fees cannot be recovered as an item of the damages in an action on the injunction bond.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered April 3, 1915, upon findings in favor of the defendants, in an action on contract, tried to the court. Affirmed.

E. H. Belden (*Chas. P. Harris*, of counsel), for appellant.

Cannon & Ferris, for respondents.

[1]Reported in 156 Pac. 396.

ELLIS, J.—Action upon an injunction bond for damages for an alleged wrongful suing out of an injunction. The only damage claimed is an asserted liability for $1,000 as attorney's fees, which it is claimed was incurred in an injunction suit in which the defendant Becker was plaintiff and the defendant National Surety Company was surety on the injunction bond for the sum of $1,000, conditioned to pay all costs and damages which might accrue to defendant in that suit, plaintiff here, by reason of a restraining order and injunction.

The court found, in substance, that the order entered in the injunction suit on January 4th purporting to quash the writ was intended by the court only as an order quashing the service; that the writ was thereafter dismissed on January 7th, upon motion of the plaintiff in that suit and a showing that the cause therefor no longer existed; that the plaintiff here, defendant there, made his first general appearance in that suit on the following day when he signed a stipulation for dismissal of that suit; that, at the time of issuing the order to show cause in that suit, Becker, the plaintiff therein, had sufficient justification and necessity for the restraining order; but that, at the time the order was dismissed, the necessity therefor no longer existed; that the defendant in that suit, plaintiff here, did not appear therein at any time for the purpose of quashing the injunction; that the complaint in this action is without merit, and that the plaintiff herein has made no showing entitling him to any relief whatsoever. Judgment went accordingly. Plaintiff appeals.

It is contended that these findings are not supported by the evidence. We shall not discuss the complicated facts leading up to the injunction suit, nor the evidence upon which the court found in this action that the respondent Becker had sufficient justification for the restraining order, further than to say that, as we view it, the evidence does not preponderate against that finding. But aside from that finding, we are convinced that the record in the injunction suit itself, which

is in evidence in this action, furnishes ample support for the other findings, and these in turn furnish ample support for the judgment.

On December 31, 1914, a temporary restraining and show cause order was issued upon the complaint in the injunction suit, returnable on January 4, 1915. At the same time, the plaintiff in that suit filed the bond upon which this action is predicated. Upon the return day, the appellant appeared "specially" and "for no other purpose" and moved the court to quash and set aside the attempted service upon him of the show cause order on the ground that the copy served was not certified and the service was not made by an officer. The motion was confessed and the court entered an order, which, so far as material, is as follows:

"That said motion be, and the same is hereby granted and said writ and the service thereof is hereby quashed, vacated and held for naught.
O. K. as to form, J. W. Cannon. Bruce Blake, Judge."

Thereupon, and upon motion of Becker, the court entered an order as follows:

"On this 4th day of January, 1915, this cause came regularly on for hearing by the court to be heard on plaintiff's show cause order and it appearing that no sufficient service has been made upon defendant H. R. Mann of said show cause order, and plaintiff moving in open court that the date at which defendant H. R. Mann is required to appear in answer to said show cause order be changed to January 7, 1915, at 1 p. m. on said day, and that service of a copy of said order or change be made upon said defendant H. R. Mann, and after hearing said motion and the argument of counsel and the court being fully advised in the premises, it is by the court—

"Ordered, That said motion be, and the same is hereby granted, that the date required of defendant H. R. Mann to appear and answer in said show cause be changed to January 7, 1915, at 1 o'clock p. m. on said date and that the time of service of said show cause order upon said defendant be extended to and including January 6, 1915.

"Bruce Blake, Judge."

On January 7th, the new return day, the court entered an order as follows:

"On this 7th day of January, 1915, this cause came regularly on for hearing by the court on application for restraining order and other relief and after hearing counsel and it appearing that the relief demanded is no longer required,

"Ordered, That said motion and application be, and the same is hereby dismissed, plaintiff consenting thereto.

O. K., E. J. C., E. H. B. Bruce Blake, Judge."

Apparently, after the entry of the last quoted order, but on the same day, the parties entered into the following stipulation:

"It is hereby stipulated and agreed by and between Cannon & Ferris, attorneys for the plaintiff, and E. H. Belden, attorney for the defendant H. R. Mann, that the above entitled action be, upon this stipulation, dismissed without costs to either party thereto, and without prejudice, and that, upon the filing of this stipulation, the court may make an order herein, dismissing said action, in accordance with this stipulation.

"Dated at Spokane, Washington, this 7th day of January, 1915.

"Cannon & Ferris, Attorneys for Plaintiff,

"E. H. Belden, Attorney for Defendant H. R. Mann."

On the following day, pursuant to that stipulation, an order as follows was entered:

"Now on this day, this cause coming on for hearing upon the stipulation of the attorneys for the plaintiff, and the attorney for defendant H. R. Mann, and upon said stipulation,

"It is now here ordered that said action as against the said defendant H. R. Mann be, and the same is hereby dismissed without prejudice or costs to either party hereto.

"Done in open court, and dated this 8th day of January, A. D. 1915.

O. K., Belden, E. J. C. Bruce Blake, Judge."

It is manifest from the second order, entered on January 4th, fixing the new return day for the show cause order, that the recital in the first order of that date purporting to quash

the writ was, as the court found, not so intended. This is further manifest from the fact that the court's jurisdiction to quash the writ itself had never been invoked by the appellant. Though counsel for plaintiff in that action placed his approval as to form upon the order, he testified in this action that the recital purporting to quash the writ escaped his notice. The court was justified in finding that the first order was intended as an order quashing the service only. So, also, the record leaves no doubt as to the correctness of the finding that the appellant did not appear at any time for the purpose of contesting or quashing the injunction.

But it is argued that the voluntary dismissal of the injunction suit was *prima facie* a confession that the injunction was wrongfully issued. Cases from other jurisdictions containing language to that effect are cited, but they seem to rest upon the ground that the dismissal "is equivalent to the court finally deciding that the plaintiff was not entitled to the injunction order." *Mitchell v. Sullivan*, 30 Kan. 231, 1 Pac. 518; *Tullock v. Mulvane*, 184 U. S. 497. Obviously, a dismissal based, as here, upon the specific ground of the cessation of the necessity for injunctive relief has no such equivalence and implies no such confession. *Thompson v. Benson*, 41 Wash. 70, 82 Pac. 1040; *Jewel Tea Co. v. Stewart*, 142 Iowa 353, 120 N. W. 962. If, as was held in the *Thompson* case, attorney's fees incurred in an unsuccessful attempt to dissolve an injunction cannot be recovered in a suit on the injunction bond, though the injunction was afterwards voluntarily dissolved, *a fortiori* it would seem that attorney's fees cannot be recovered where, as here, no attempt was made to secure a dissolution of the injunction, though it was voluntarily dissolved when no longer needed. Even assuming that the injunction was wrongfully issued, it is the established law in this state that, where no motion is made for its dissolution nor any attack upon the merits of the injunction itself, attorney's fees as an item of damages cannot be recovered in an

action on the injunction bond. *Donahue v. Johnson*, 9 Wash. 187, 37 Pac. 322; *White Pine Lumber Co. v. Aetna Indemnity Co.*, 42 Wash. 569, 85 Pac. 52; *Collins v. Huffman*, 48 Wash. 184, 93 Pac. 220; *Kitsap County Bank v. United States Fidelity & Guaranty Co.*, *ante* p. 12, 155 Pac. 411.

The case of *Anderson v. Provident Life & Trust Co.*, 26 Wash. 192, 66 Pac. 415, relied upon by appellant, is readily distinguishable from the cases above cited and from this case. True, in that case, as here, the only relief sought was injunctive and no formal motion was made to dissolve the injunction; yet, as the court remarks, "the demurrer to the bill reached the injunction as effectively as a motion would have done." That, as the opinion shows, was the express basis of the allowance of the recovery of attorney's fees as an item of damages.

The case of *Berne v. Maxham*, 82 Wash. 235, 144 Pac. 23, is even less applicable. There the court found as a fact that the services were rendered in procuring the dissolution of an injunction wrongfully sued out.

In the case here, the appellant appeared specially and moved only against the service. The bond was not conditioned as a guaranty of a valid service. On these facts, we can see no controlling significance in the fact that the only relief sought was injunctive. The fact remains that the injunction was never attacked on the merits by motion or otherwise.

Had other damages than the incurring of attorney's fees been claimed and established, a different question would be presented. *Kitsap County Bank v. United States Fidelity & Guaranty Co.*, *supra.*

The judgment is affirmed.

MORRIS, C. J., MOUNT, and CHADWICK, JJ., concur.

[No. 13230. Department Two. April 5, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v. ANDREW P. HALS, *Appellant*.[1]

FISH — LICENSES — REVOCATION — REPEAL OF STATUTE — PROPERTY RIGHTS. The right to take fish and to a fishing location and to the renewal of licenses therefor, by virtue of a survey, location and occupancy pursuant to Rem. & Bal. Code, § 5214, is not a property right nor anything more than a mere revocable license, which was lost on repeal of that section by the fisheries code, Laws 1915, p. 73, § 20.

CONSTITUTIONAL LAW — SPECIAL PRIVILEGES — FISH — REGULATION. The fisheries code of 1915 (Laws 1915, p. 67) is not unconstitutional as discriminatory between persons, in that it prohibits gill net fishing and other appliances other than hook and line in certain portions of some of the rivers flowing into Puget Sound, and allows it in others.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered October 11, 1915, upon a trial and conviction of unlawful fishing. Affirmed.

E. C. Dailey and *Clifford Newton*, for appellant.

O. T. Webb and *Percy Gardiner*, for respondent.

PARKER, J.—The defendant Andrew P. Hals, was charged by information filed in the superior court for Snohomish county with the commission of a misdemeanor in that he "did unlawfully take and catch food fishes other than with hook and line, to wit:—with a gill net, in the Stillaguamish river, a river flowing into Puget Sound." His trial in the superior court resulted in conviction and judgment thereon, from which he has appealed to this court.

Appellant's prosecution and conviction are rested upon the provisions of the fisheries code of 1915 reading as follows:

"It shall be unlawful, except with hook and line, to take any of the food fishes mentioned in this act in the Skagit river about the Great Northern railway bridge across the

[1]Reported in 156 Pac. 395.

same at Mount Vernon, and in the Snohomish river above the Snohomish wagon bridge, or above the wagon bridge at Riverton in the Duwamish river, and in all other rivers and streams flowing into Puget Sound." Laws of 1915, p. 73, § 20.

Counsel for appellant contend that his conviction under this law in effect violates his property rights secured by his fishing location in the Stillaguamish river, occupied in pursuance of his survey and location thereof under the provisions of Rem. & Bal. Code, § 5214 (P. C. 191 § 81), being a part of the former law relating to food fishes, and reading in part as follows:

"Every person, firm or corporation being the owner, holder or occupant of any one or more existing set net, fish-trap or pound net locations when this act takes effect, shall have the exclusive and preference right for ninety days thereafter within which to file such maps with the respective county auditors. From and after the filing of any such map in the office of any county auditor, the occupant or claimant of the fishing location thereon shown, and his heirs, successors and assigns shall have the exclusive right to occupy, maintain and fish such location, to renew the licenses therefor, and to mortgage, sell and transfer such right, during such time as he or they shall comply with the requirements of the law of the state of Washington, pertaining thereto in other respects."

These provisions, among others of the former law, were expressly repealed by the fisheries code of 1915 above quoted from. We shall assume that appellant acquired all of the rights in his fishing location which could be acquired by him by compliance with the former law, and that his conviction in this case was for the taking of fish with a gill net from that location.

Counsel for appellant proceed upon the theory that appellant's right to the fishing location and to take fish therefrom became, by virtue of his survey, location, and occupancy thereof under the former law, a property right which could not thereafter be disturbed or taken from him without compen-

sation, by repeal of the law under which he acquired the right. We are quite unable to see that the right secured to appellant through his location made under the former law, amounted to anything more than a mere license from the state. We think it was not a grant from the state passing an irrevocable privilege to either occupy or take fish from the location. Nothing could seem plainer than that a general license to fish in the waters of the state is not irrevocable, and it seems equally plain to us that a license or privilege acquired by appellant to occupy this particular fishing location is equally revocable by repeal of the law under which it was acquired and the enactment of new and other regulations pertaining to fishing.

In *Phipps v. State*, 22 Md. 380, 85 Am. Dec. 654, and *Hess v. Muir*, 65 Md. 586, 5 Atl. 540, 6 Atl. 673, the Maryland court dealt with a similar question relative to oyster cultivation upon state lands, and reached conclusions in harmony with this view. We are of the opinion that whatever license or privilege was acquired by appellant by virtue of his compliance with the former law was revoked by the repeal of that law and the enactment of the fisheries code of 1915 containing the penal provision above quoted upon which his conviction rests.

Some contention is made in appellant's behalf that the fisheries code is unconstitutional in so far as the provisions thereof here involved are concerned, in that it unlawfully discriminates between persons, giving privileges to some which are withheld from others under like conditions. This contention seems to be rested upon the theory that the unlawful discrimination consists in allowing fishing with gill nets and other appliances other than hook and line in certain portions of the Skagit river, the Snohomish river, and the Duwamish river, while such privilege is withheld from being exercised in other rivers flowing into Puget Sound. This contention is fully answered by our decision in *State v. Tice*, 69 Wash. 403, 125 Pac. 168, 41 L. R. A. (N. S.) 469; *Cawsey*

v. Brickey, 82 Wash. 653, 144 Pac. 938, and *Barker v. State Fish Commission*, 88 Wash. 73, 152 Pac. 537, holding that such classification is not a discrimination as between persons and not violative of any constitutional right.

The judgment is affirmed.

MORRIS, C. J., MAIN, and HOLCOMB, JJ., concur.

[No. 12785. Department One. April 6, 1915.]

M. W. PHILIPS *et al.*, *Respondents*, v. W. E. COUMBE *et al.*, *Appellants*.[1]

WATERS AND WATER COURSES—EASEMENTS—PRESCRIPTIVE RIGHT—ABANDONMENT—EVIDENCE—SUFFICIENCY. A prescriptive right for the flow of waste water from irrigated lands cannot be claimed, where, by a preponderance of the evidence, it appears that the waste ditch had been abandoned for eleven years by defendant's predecessors before he purchased, and as often as it was opened by defendant it was closed by the plaintiffs.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered November 28, 1914, upon findings in favor of the plaintiffs, in an action for an injunction and damages. Affirmed.

Clark & Lockhart and *Edward C. Coumbe*, for appellants.

Parker & Holden, for respondents.

ELLIS, J.—Action to enjoin defendants from discharging waste irrigation water from their lands into a certain waste ditch running across plaintiffs' land, and for damages.

The lands involved all lie in the northeast quarter of section 13, township 13, range 18 east, W. M., in Yakima county. In August, 1883, this quarter section was conveyed by United States patent to one William D. Beck. In June, 1887, Beck sold and conveyed to Philena W. Thorp fifty-four

[1]Reported in 156 Pac. 535.

acres, more or less, embracing the lands now owned by both parties to the present controversy. In 1888, Mrs. Thorp and her husband sold and conveyed to one Hall the land now owned by plaintiffs which we shall designate as the Philips tract. Through various mesne conveyances, and by deed from one Hillis in December, 1901, the title to this tract became vested in one George A. Petty, who conveyed it to plaintiffs on January 2, 1908.

In January, 1889, the Thorps conveyed all the lands now owned by the defendants, which we shall designate as the Coumbe tract, to one John J. Backer, who held the south ten acres until December, 1899. Through mesne conveyances, title to this south ten acres of the Coumbe tract passed to one Inman in 1906, who, on June 4, 1907, conveyed this south ten acres to defendants.

In February, 1889, Backer conveyed the north three acres of the Coumbe tract to Catherine Fintel. Title to the three acres passed from Mrs. Fintel and husband by mesne conveyances and by deed from one Foskey to defendants on August 17, 1908.

The Coumbe tract of thirteen acres lies on the west side of the Selah highway; the Philips tract of ten acres, on the east side. All of the land is, and long has been, irrigated by a common ditch running from a main ditch and passing along the south side of the Coumbe tract to the southwest corner of the Philips tract. Both tracts are irrigated from west to east by means of ditches running from this common ditch along the west side of each tract respectively. The waste ditch in question runs from a point on the Selah highway near the northwest corner of the Philips tract easterly across the north end of that tract to the old Yakima City waste ditch. So far as a thing so remote can be established, the evidence shows that, from the time this land was first occupied and so long as it remained in common ownership, first of Beck, then of the Thorps, it was, so far as irrigated at all, irrigated from west to east and the waste from the land west

of the road was allowed to flow in some way across the land east of the road. It doubtless entered at the northwest corner near where the present waste ditch starts, since the land and the highway there are low. For a large part of that time and much of the time since, there was a wooden culvert across the road at that point. From the time of the severance of the common ownership of these tracts by the conveyance from the Thorps in 1888 of the Philips tract to Hall, the evidence as to when, by whom, and to what extent this waste ditch was used by the various owners of the Coumbe tract is conflicting and much confused. There are, however, some features so salient and certain as in our opinion to be controlling. To these we shall advert in our discussion.

The court found that, since April, 1914, the defendants, wrongfully and without right, have discharged and permitted to flow upon plaintiffs' land quantities of waste water and are threatening to continue so to do; but that plaintiffs had already suffered only nominal damages. The court concluded, as a matter of law, that a perpetual injunction should issue. Decree went accordingly. Defendants appeal.

The appellants claim a right of easement to use this ditch either (1) by an implied grant or reservation resulting in favor of the Coumbe tract when the common owner, Thorp, conveyed the Philips tract and retained the Coumbe tract; or (2) by prescriptive use.

The first claim is based largely upon our decision in *Schumacher v. Brand*, 72 Wash. 543, 130 Pac. 1145. But the facts in that case are the converse of those here presented. There the dominant estate was first conveyed, the grantor retaining the servient tenement. Where, as here, the servient estate is first conveyed, whether or not there can be an implied reservation of an easement therein in favor of the land retained by the grantor in the face of his absolute deed is a much mooted question. 3 Farnham, Water & Water Rights, § 832. We find it unnecessary to decide it here.

Even assuming an implied reservation of the easement in favor of appellants' land on the severance of the ownership in 1888, we are convinced that the easement no longer exists. We shall not discuss the evidence further than to say that we are satisfied that, during the period of nearly eleven years, when Backer owned the south ten acres of the Coumbe tract, none of his waste water ran through this ditch. He had little or no waste water and did not know of the existence of the ditch here involved. He so testified, and it is clear that, if there ever existed an easement in favor of this land, it was abandoned during the period of his ownership. The west end of the ditch was closed and sodded over when the respondents purchased their land and the old wooden culvert across the highway was not then in existence. Respondent Philips so testified, and is corroborated by Petty, who owned the Philips tract from 1901 to 1908. Petty, in 1905 or 1906, filled the northwest corner of this tract to a depth of several inches and blocked the west end of the ditch completely by a dam. Whatever waste water there was from the Coumbe land then flowed over onto the Miller land to the north of the Philips tract. Petty so testified, and while he is contradicted by some of the witnesses, we are satisfied, that during Petty's ownership of this land, there was no serious claim on the part of the owners of any of the Coumbe land of an easement in the ditch in question. The evidence is clear that, after Coumbe purchased his land, he several times opened the west end of the waste ditch, and it is just as clear that, as often as he did so, the respondents closed it. In 1911, the county improved the highway, filling it and putting in a concrete culvert opposite the ditch, but so high that no waste water from any of appellants' land would flow through it. This condition continued during the years 1912 and 1913. In 1914, appellant built a flume to raise his waste water to this culvert and again opened the embankment at the west end of the ditch, thus precipitating this suit.

As we read the evidence, and we have read it all and considered it all, it strongly preponderates in favor of the view that, if there ever was an easement, it was abandoned by appellants' predecessors in title long before they purchased the land. The claim of a prescriptive right is wholly untenable. We are clear that, whatever use has been made of this ditch by the owners of the Coumbe tract has been merely permissive, interrupted for years at a time, and never exercised for the prescriptive period at any time.

The evidence will not warrant a reversal. The judgment is affirmed.

MORRIS, C. J., MOUNT, CHADWICK, and FULLERTON, JJ., concur.

[No. 12821. Department Two. April 6, 1916.]

AMERICAN SAVINGS BANK & TRUST COMPANY, *Appellant*, v. PETER DENNIS, *Respondent*.[1]

BANKS AND BANKING—DEPOSITS — "FOR COLLECTION"—ACTIONS—CUSTOM AND USAGE—EVIDENCE—ADMISSIBILITY. In an action upon a check, upon an issue as to whether it was taken for deposit or only for collection as agent of the customer, the bank is not entitled to show its custom or rule in dealing with other customers in such cases, where the customer in question was not aware of any such custom or rule of the bank.

EVIDENCE—CONCLUSION OF WITNESS. In an action upon a check, whether the teller took the check governed by the printed statement at the foot of the deposit slip cannot be shown by the statement of the teller, as it would be merely his conclusion, where nothing was said beyond the mere passing of the time of day.

BANKS AND BANKING—DEPOSITS—"FOR COLLECTION"—ACTIONS—EVIDENCE. A printed declaration at the foot of a deposit slip that the bank takes the check for collection and only as agent of the customer is some evidence of that fact, although credit was given and the customer was allowed to check against the deposit.

SAME—DEPOSITS FOR COLLECTION—CHECKS—TITLE. Where a check is deposited with the understanding that, if the bank fails to col-

[1]Reported in 156 Pac. 559.

lect it, the amount is to be charged back, the check remains the property of the depositor, and allowing him to check against it is a mere gratuitous privilege.

Appeal from a judgment of the superior court for King county, Claypool, J., entered October 21, 1914, dismissing an action on contract, upon granting a nonsuit. Affirmed.

Farrell, Kane & Stratton, for appellant.

J. L. Corrigan, for respondent.

MAIN, J.—This is an action to recover upon a check. The facts are briefly these: On August 14, 1913, one Peter Dennis drew his check on the Farmers and Merchants' Bank of Edison, Washington, for the sum of $750, payable to the order of P. H. Casey; and on the same date, the check was delivered to Casey. On the following day, Casey, who was then, and for some time prior thereto had been, a customer of the American Savings Bank & Trust Company, deposited the check in that bank. In making the deposit, he filled out the usual deposit slip, indorsed the check in blank, and presented the check and the deposit slip to one of the bank tellers. Thereupon the teller entered in Casey's pass book the amount of the check; and upon the books of the bank he was given credit for the sum as cash. No conversation took place between the teller and Casey other than the mere passing of the time of day.

On the face of the deposit slip, there was this printed provision:

"This bank in receiving checks or drafts on deposit or for collection acts only as your agent, and beyond carefulness in selecting agents at other points and in forwarding to them, assumes no responsibility. In making this deposit the depositor hereby assents to the above conditions."

There were other conditions which are not here material.

On the same day that the check was deposited, it was forwarded by mail to the Farmers and Merchants' Bank of Edison. On August 22, 1913, the Farmers & Merchants' Bank

reported to the American Savings Bank & Trust Company that payment of the check had been stopped.

After Casey had deposited the check, and prior to the time when the American Savings Bank & Trust Company knew that payment had been stopped, Casey drew checks against his account, which were paid, to the amount of $664.70. Upon the return of the check by the bank at Edison, demand was made upon Casey to make good the amount which he had drawn against the credit of this check; but he did not comply with this demand. Thereafter this action was instituted against Casey, and also against Dennis, the drawer of the check. In due time, the cause came on for trial before the court and a jury, judgment in the meantime having been taken against Casey by default. At the conclusion of the plaintiff's evidence, Dennis moved for a nonsuit. This motion was granted and a judgment was entered dismissing the action as to him. From this judgment, the plaintiff appeals.

The assignments of error are all based on the rulings of the trial court in rejecting certain offered testimony. By these offers, the appellant desired to prove: (a) The course of business with its depositors when checks were received drawn on other banks as to whether such checks were taken by the bank as agent or "ordinarily put the money to their credit as you did in this case and give them full credit for it." (b) That, according to the rule and practice of the bank, if the check in question had been taken for collection, "it would never have gone on the books to the credit of Mr. Casey at all, but it would have been received at the collection window, and Mr. Casey's account would not have shown this credit of $750 until the check came back from Edison with the report of the bank." And (c) to have the teller who received the check state whether he took the check "governed by the printed statement on the bottom of it (the deposit slip), or did you give him credit for the amount and permit him to draw against this account?"

The controlling question is whether the evidence offered was admissible. The bank claims that, when the check was received and the deposit made in the manner indicated, it became the owner of the check. Dennis claims that the bank received the check as agent for the purpose of collection.

As to the first and second offers, the appellant desired to prove its course of business with other customers, and the rule or practice of the bank when a check was received for collection only. There is no evidence, nor offered evidence, which would show that Casey, at the time he made the deposit, knew the method by which the bank dealt with its other customers, or its practice or rule relative to checks received for the purpose of collection only. In the absence of such knowledge, the practice of the bank in dealing with its other customers, or the rule of the bank when a check was received for collection only, could not well enter into and become an element of the contract that was made by Casey when he deposited the check. In other words, the practice or rule of the bank is not binding on the customer unless it is shown that such customer had knowledge thereof. 5 Cyc. 488; 1 Morse, Banks & Banking (4th ed.), p. 31; 1 Michie, Banks & Banking, p. 651.

By the third offer, it was desired to prove by the teller who received the check whether he took it governed by the printed statement on the bottom of the deposit slip. Whatever answer the teller would have given to this question would have been merely his conclusion, and therefore the objection thereto was properly sustained. The court ruled that everything that was said and done between the teller and Casey at the time of making the deposit could be shown. But as already stated, there was no conversation between them other than the mere passing of the time of day, after which the deposit slip and check were received by the teller and the amount entered upon Casey's pass book, and credit given to him upon the books of the bank. The printed declaration on the deposit slip to the effect that the bank in receiving checks acted

only as agent was some evidence of an understanding that it was the intention of the parties that the bank should take the check as agent, and not as owner. If the position of the parties were reversed, and the bank were relying upon the deposit slip to show that it received the check as agent only, Casey, in the absence of any other evidence bearing on the question, could not reasonably contend that it was received in any other capacity.

Whatever the rule may be in other jurisdictions—and there is some conflict in the authorities—it seems to be reasonably well settled in this state that, where a check is received and deposited as in this case, and the depositor checks against it with the understanding that, if the bank fails to collect the check, the amount is to be charged back, the check remains the property of the depositor, and title thereto does not pass to the bank. The allowing a depositor to check against such paper is a mere gratuitous privilege. *Washington Brick, Lime & Mfg. Co. v. Traders Nat. Bank*, 46 Wash. 23, 89 Pac. 157, 123 Am. St. 912; *Morris-Miller Co. v. Von Pressentin*, 63 Wash. 74, 114 Pac. 912; *Belsheim v. First Nat. Bank of White Salmon*, 77 Wash. 552, 137 Pac. 1055; 2 Morse, Banks & Banking (4th ed.), § 586.

The judgment will be affirmed.

MORRIS, C. J., HOLCOMB, PARKER, and FULLERTON, JJ., concur.

[No. 13014. Department Two. April 6, 1916.]

MILWAUKEE LAND COMPANY, *Respondent*, v. JOSIAH BURK *et al.*, *Appellants*.[1]

APPEAL — RECORD — WAIVER OF DEFECTS. The omission of the names of certain appellants in a motion to strike the statement of facts is immaterial where their counsel appeared and resisted the motion.

APPEAL—DECISIONS—FINALITY. Upon denial of a petition for rehearing directed to an order striking the statement of facts, the order is not subject to review.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 13, 1915, upon findings in favor of the plaintiff, in an action to quiet title, tried to the court. Affirmed.

Edward K. Hawkins and *J. N. Perkins*, for appellants.

Geo. W. Korte and *Robert C. Saunders*, for respondent.

MAIN, J.—The purpose of this action was to quiet title to a tract of land consisting of approximately 14.70 acres. After the issues were framed, the cause was tried to the court without a jury, and resulted in findings of fact, conclusions of law, and a judgment quieting the title to the land in the plaintiff. From this judgment the appeal is prosecuted.

After the record upon appeal had been filed in this court, the respondent moved that the statement of facts be stricken because not filed within the time required by law. This motion, upon hearing, was granted. Thereafter a petition for rehearing was presented, and, after consideration, was denied. When the case came on for hearing upon the merits, counsel representing two of the defendants, to wit, John N. Perkins and wife, insisted that the order striking the statement of facts was not operative as to them because their names did not appear in the title of the case as stated on the motion to

[1]Reported in 155 Pac. 577.

strike the statement of facts. But this contention is not well founded, for the reason that counsel representing these two defendants appeared in response to the motion and resisted its being granted. Whatever defect there may have been in the caption of the case under which the motion to strike was stated, the defendants whose names did not appear therein were in nowise misled thereby. Having appeared in response to the motion, Perkins and wife are bound by the order entered therein. Had they in anywise been misled by reason of the fact that their names did not appear in the title of the case, a different question would be presented.

The petition for rehearing directed to the order striking the statement of facts being denied, that order is not longer subject to review. In the present state of the record, the only question open for consideration is whether the findings support the judgment. A consideration of the findings leads to the conclusion that the judgment is supported thereby.

Judgment affirmed.

MORRIS, C. J., BAUSMAN, HOLCOMB, and PARKER, JJ., concur.

[No. 13047. Department One. April 6, 1916.]

EPHRAIM BANNING, *Appellant*, v. COMMERCIAL ORCHARDS COMPANY OF WASHINGTON, *Respondent*.[1]

VENDOR AND PURCHASER—TIME—TENDER OF PERFORMANCE. Where a specific time is not fixed for the delivery of a deed, the vendor has a reasonable time after payment to make and tender it.

SAME—RESCISSION BY VENDEE—DELAY—WAIVER. Rescission by vendee for delay, and stipulations making time of the essence, are waived where he accepted interest payments after time for performance, retained an outstanding deed, and made no demand for deed and abstract or offer to put the vendor *in statu quo*.

SAME—RESCISSION—ACTIONS—DEFENSES. A vendee's action for rescission for delay in making the deed, although in form for sums paid and damages, is subject to equitable defenses.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered April 2, 1915, upon findings in favor of the defendant, in an action for rescission, tried to the court. Affirmed.

D. R. Glasgow and *A. O. Colburn*, for appellant.

Voorhees & Canfield, for respondent.

CHADWICK, J.—Respondent contracted to convey a certain tract of orchard land to appellant. The payments being completed, respondent delayed the tender of a deed because the engineer who had platted the ground was in Canada, and had not furnished a plat properly certified for filing. After some correspondence and negotiations, respondent delivered a deed sufficient in form to convey the land. Respondent requested that the deed be withheld from the record until the engineer had finished certain work he was then engaged upon and could return and finish his plats. This seems to have satisfied appellant for the time being. The contract called for certain interest payments pending the final transfer of

[1]Reported in 156 Pac. 547.

the property. These were paid by respondent and accepted by appellant. Respondent finally had a plat of the property prepared from the original. Between the acceptance of the first deed and the acceptance of the interest payments and the final tender of the deed and abstract, appellant began this action to rescind the contract.

The trial judge found—and his findings are sustained by the evidence—that there was delay in the final payment by appellant which was waived by respondent; that, at all times after the final payment and up to the commencement of this action, which was the first notice given by appellant of his intent to claim rescission, appellant had treated the property as his own, and had waived the stipulations making time of the essence of the agreement—that being the condition upon which he now relies; and that he could not maintain the action without first giving notice of his intention to rescind and allowing reasonable time for compliance with the obligation to deliver an abstract and deed and offering to restore all moneys received from respondent as interest, or to give credit therefor and putting respondent in *statu quo* by a redelivery of the deed first executed which was then outstanding. Rescission is an equitable remedy, and one who seeks it must do equity. 2 Warvelle, Vendors, § 930; *Reidt v. Smith*, 75 Wash. 365, 134 Pac. 1057.

The contract provided that the respondent

". . . shall and will, upon the completion of the payments aforesaid, make, execute and deliver a good and sufficient deed conveying to said party of the second part a perfect title to the real property hereinabove described."

Where a specific time is not fixed for the delivery of a deed, the vendor shall have a reasonable time after payment to make and tender it. *Skoog v. Columbia Canal Co.*, 63 Wash. 115, 114 Pac. 1034.

Or if the contract be treated as one fixing a definite time, appellant, by his delay and conduct with reference to the property, has waived the element of time and concurrent delivery

of the deed, and must, if he would rescind, give notice of his intention to claim his equitable rights, that is, to rescind unless a deed is forthcoming within a reasonable time thereafter. *Owen v. Pomona Land & Water Co.*, 131 Cal. 530, 63 Pac. 850, 64 Pac. 253. See, also, on principle, *Walker v. McMurchie*, 61 Wash. 489, 112 Pac. 500; *Watson v. White*, 152 Ill. 364, 38 N. E. 902.

If we treat the complaint as a demand for a deed—although it is, in form, a demand for the sums paid and damages—it invites the interposition of equitable defenses and will be given no broader construction than the right to which appellant is entitled. When measured by all the equities of the case, the tender of the abstract and deed with the answer was a tender within a reasonable time.

The right of appellant to recover is not within either the facts as disclosed by the record, or the law as it is found in the books. Wherefore the decree of the lower court is affirmed.

MORRIS, C. J., MOUNT, ELLIS, and FULLERTON, JJ., concur.

[No. 13137. Department One. April 6, 1916.]

SUSIE A. O'MEARA *et al.*, *Respondents*, v. R. E. RUSSELL *et al.*, *Appellants*.[1]

DAMAGES—PERSONAL INJURIES—FRIGHT—PROXIMATE CAUSE. Damages are recoverable for physical injuries to the person resulting naturally from fright caused by defendants' negligent act where the same was the proximate cause of the injury, although there was no impact to the person preceding the fright.

SAME—PERSONAL INJURIES—MENTAL SUFFERING—FRIGHT. In an action for damages from physical injuries to the person caused by fright, it is not error to refuse to instruct that the plaintiff cannot recover for mental suffering "which was the result of fright and not of any physical injury," since the jury could have inferred that there could be no recovery where there was no physical injury causing the fright.

EXPLOSIVES—NEGLIGENCE—EVIDENCE—ADMISSIBILITY. In an action for personal injuries from blasting in a city, evidence that defendants had no license to use explosives is not prejudicial, where the negligence was admitted.

APPEAL—REVIEW—VERDICT. The supreme court will not disturb a verdict as excessive, where the trial court refused to disturb it, and the court is not satisfied that it is excessive.

Appeal from a judgment of the superior court for King county, Humphries, J., entered May 22, 1915, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained through the setting off of a blast. Affirmed.

Preston & Thorgrimson (*F. E. Sansom*, on the brief), for appellants.

Jay C. Allen (*Philip Tindall*, of counsel), for respondents.

MOUNT, J.—The plaintiffs recovered a judgment of $3,000, upon the verdict of a jury, for personal injuries resulting to Mrs. O'Meara. The defendants have appealed from that judgment.

[1]Reported in 156 Pac. 550.

It appears that, in the summer of 1914, the appellants were clearing a street in the city of Seattle under a contract with the city. In doing this clearing, the appellants were using stumping powder in blasting stumps. The respondents lived in a house about one hundred and forty feet distant from the street which was being improved. On August 24 of that year, a stump was blown through the air a distance of about one hundred and fifty feet, and struck the eaves trough of the respondents' house near the corner of the house. Mrs. O'Meara was standing in the house near the door. She saw the stump coming toward her, and saw it strike the house a few feet above her head. She was so frightened by the occurrence that she does not know what occurred thereafter until she found herself at the home of a neighbor about four blocks away. She evidently ran away from the house after the shock.

The evidence tends to show that she was injured internally, either from the shock or in attempting to escape from the house after the stump had hit the house. At that time she was a woman about forty-five years of age, and prior to that time had had two surgical operations, one for the removal of gall stones and the other for the removal of a tumor. This last operation was performed about ten months previous to the time the stump struck the house. After these operations, she was comparatively well.

She testified that, after she came to herself at her neighbor's house, she felt severe pain internally, and thought that the incision which had been made for the operations had been opened; that she commenced to flow profusely, although her regular menstruation had ceased about ten days before. The doctors testified that she was thereafter tender about the liver, and was sensitive in the region of the bladder.

At the trial of the case, the court instructed the jury to the effect that, if they found that the defendants carelessly or negligently caused a quantity of stumping powder or other explosive to be discharged or set off in close proximity

to the plaintiffs' home, and that such explosion caused a stump to be thrown through the air and against the home of the plaintiffs, and that, by reason thereof, Mrs. O'Meara became frightened, and because thereof, through fear, and in an effort to protect herself and escape the threatened danger she sustained injuries to her person, internal organs, or her nervous system, and has suffered damages thereby, then it would be the duty of the jury to find a verdict for the plaintiffs, if they found that the negligence of the defendants was the proximate cause of the injury; and that if, by reason of the negligence of the defendants, she sustained injuries or damages to her person, internal organs or nervous system, then the defendants would be liable for such damages sustained; and that if, by reason of the vibration and concussion caused by the discharge of the blast, Mrs. O'Meara reasonably believed that she was in danger or peril, then the jury were charged that Mrs. O'Meara had a right to attempt to escape and flee from such danger.

There are several assignments of error, but the principal question presented upon this appeal is, Can there be a recovery for fright resulting in personal injury where there was no impact or injury to the person preceding the fright? It is not claimed that the stump which struck the respondents' house struck Mrs. O'Meara. It is strenuously argued by the appellants that, by reason of the fact that the stump did not touch Mrs. O'Meara, she was therefore merely frightened by it, and for that reason there can be no recovery.

The appellants rely principally upon the case of *Corcoran v. Postal Telegraph-Cable Co.*, 80 Wash. 570, 142 Pac. 29, L. R. A. 1915 B 552, where we held:

"That mental suffering, independent of physical injury, does not, at common law, render a person who merely negligently causes such suffering answerable in damages therefor is settled by the decisions of the great majority of the states of the Union, and by an unbroken line of decisions of the Federal courts."

Many of the cases from other states relied upon by the appellant are cited and quoted from in that opinion. That was a case where there was no physical injury claimed. The only claim of damages was that there was mental suffering by reason of the fact that a telegram was improperly addressed by the telegraph company and was not delivered. We desire to adhere to that rule. But we think it has no application to this case because there the only injury suffered was mental. There was no physical injury. In the case at bar, the injury, if the testimony of the respondents is to be believed, was physical, caused from fright.

The respondents rely upon the case of *Winston v. Terrace*, 78 Wash. 146, 138 Pac. 673. That was a case where the defendant entered upon the premises of the plaintiffs, and with a pistol frightened Mrs. Winston from her home, and in escaping therefrom she became nervous and disabled from performing her household duties, and lived in constant fear of Mr. Terrace for a number of months. We held that there could be a recovery under those circumstances. That was a case of willful invasion of the defendant's home. We think it is more nearly related to this case than is the *Corcoran* case above referred to. We do not desire to depart from the rule in either case, because we are satisfied that the rule announced in each of those cases is correct. We are of the opinion that the rule in the *Terrace* case is more nearly applicable to the case in hand than is the rule in the *Corcoran* case.

It is conceded in the briefs that the authorities in the different states are in hopeless conflict upon the question whether there can be a recovery in a case like this. It would be a work of supererogation, and would unduly lengthen this opinion, to review all of the cases cited from the different states upon the question here presented.

The rule is stated in 8 Am. & Eng. Ency. Law (2d ed.), 665, as follows:

"On this point there is much conflict in the cases. The weight of authority seems to be that in cases of negligence merely, where some actual damage must be shown to constitute a cause of action, the mere fear or nervous apprehension of physical injuries which are never, in fact, received is not such damage as will support the action, even though actual physical injury follows as a consequence of the mental disturbance. By some cases this principle is held to exclude recovery in all cases of mental distress or nervous shock resulting from negligence where there is no bodily injury contemporaneous therewith. Damages, therefore, for the result of a nervous shock or mental distress caused by apprehension of injury from an impending collision which did not occur were held, according to this doctrine, not recoverable; such consequences, it has been held, resulting rather from the condition and circumstances of the individual than the act of the defendant."

In 8 R. C. L. 525, the rule is stated as follows:

"While fright or nervous shock may always be considered in awarding damages where there is a contemporaneous physical injury, some of the courts hold that no recovery can be had for bodily pain and suffering resulting from fright caused by a negligent act where the fright is not accompanied by such injury. In a most extreme case it has been held that this is the rule even if the negligence was gross and the party in fault ought to have known that the result would follow his act. The reasons generally given for so holding are that the physical injury caused by the fright is not the proximate result of the wrongful act, and that, so contending, the physical injury is too remote or of a character too metaphysical or difficult of proof. Another reason sometimes advanced in those jurisdictions where there can be no recovery for fright is to the effect that, logically, there can be no recovery for the consequences thereof."

Many cases are cited in the footnotes supporting this rule, a number of which are referred to in the appellants' briefs. On page 527, 8 R. C. L., the other rule is stated as follows:

"It is a general and most salutary rule that bodily pain and suffering resulting from fright is a proper element of damage though no physical violence is done the person of

the plaintiff, provided, of course, the injury is the proximate result of the negligent act, or is the natural and probable consequence thereof. And so a recovery may be had where the fright reasonably induces action which results in external injury, applying the rule that if one, by negligence, puts another under a reasonable apprehension of personal physical injury, and the latter, in a reasonable effort to escape, sustains physical injury, he may recover for such injury and the mental disorder naturally incident to its occurrence. Some courts hold that recovery may be had for injuries which are the direct result of the fright and violent physical exertion occurring at the same time, though there is no personal contact, as by fright and the physical exertion of running away. The reasons usually given for the general rule stated are that bodily pain and suffering, and even physical personal injuries, may result from fright. Furthermore, a disturbance of the nervous system due to fright is recognized as a physical rather than a mental disease; and this may be the case though the mind is at the same time injuriously affected. Since the nerves are, as a matter of fact, a part of the physical system, if they are affected by fright to such an extent as to cause physical pain, the injury resulting therefrom is the direct result of the act producing the fright; and if the physical injury result directly from the fright or shock, such fright or shock is regarded as an element of proximate causation as truly as might be a physical impact from which like results must flow. The fact that it is more difficult to produce such an injury through the operation of the mind than by direct physical means affords no sufficient ground for refusing compensation. Generally speaking, no recovery can be had for physical injuries resulting from fright because of another's danger; and ordinarily, to warrant a recovery, the fright must have resulted from a tort committed by the plaintiff against the defendant, and not against a third person."

This rule, and each statement in it, is supported by abundant authorities cited in the footnotes. We are of the opinion that this is the more reasonable rule to be applied to the case now in hand.

It is true there was no physical impact of the stump against the person of Mrs. O'Meara. But it is manifest that if this

stump had touched the person of Mrs. O'Meara in the slightest degree, then the appellants, under all the authorities, would be entitled to recover for all resulting injuries. The mere fact that it did not touch her seems not a sufficient reason for holding that the results which follow may not be recovered for. When Mrs. O'Meara heard the blast which hurled the stump in her direction, and when she saw the stump coming, she no doubt stated truthfully that she thought it would strike her. It did not strike her; but it struck the house a few feet above her head. That she was frightened, there can be no doubt. She clearly was justified in attempting to escape from the peril which then confronted her. And if in attempting to escape, even by leaving the house, or running up a hill, which she did, injuries were caused to her person thereby, it seems upon reason, as well as upon authority, that she would be entitled to recover for the injuries naturally resulting from that fright.

We think this case is entirely different from a case where the injuries are psychological and not physical. In this case the injuries resulting from the fright were physical injuries. They were not psychological or mental. It seems, under these circumstances, where there is physical injury which results naturally, that the injured person is entitled to recover equally as though there had been a direct impact which caused the same injury. We therefore desire to follow the rule last above stated. It is not in conflict with the *Corcoran* case; and we think it is a just and reasonable rule. We are satisfied that the court properly instructed the jury upon that question.

The court refused an instruction requested by the appellants as follows:

"You are instructed that the plaintiffs cannot recover for the mental suffering, if any, of the plaintiff, Mrs. O'Meara, which was the result of fright, and not of any physical injury."

It is not clear just what is meant by this instruction when considered with reference to the facts in the case. If it were meant to request the court to instruct the jury that there could be no recovery for mental suffering alone, if they found there was no physical injury, then no doubt, under the rule in the *Corcoran* case, such an instruction might have been proper. But we think this instruction was too broad under the facts in the case, because it impliedly says to the jury that there can be no recovery for mental suffering which was the result of fright and not of physical injury. The jury would have inferred from this last statement that there could be no recovery where there was no physical injury causing the fright. We think, therefore, the court was not required to give the instruction.

The appellant next contends that the court erred in receiving evidence to the effect that the contractors did not have a license from the city to use explosives within the city limits. It is claimed by the appellants that negligence was not an issue in the case because counsel for the appellants had admitted that there was negligence of the defendants, and that the offer of this evidence was prejudicial. While there was probably no necessity of permitting this evidence to go to the jury, we think this was not reversible error.

It is next contended that there is no proof of physical injury resulting from the fright. If the testimony of the respondents is to be believed, and some of the physicians who testified upon the question, we think there can be no doubt that there was sufficient evidence to go to the jury upon this question.

It is lastly argued that the damages awarded are excessive. This depends, of course, upon the extent of the injuries. The character of the injuries were no doubt more or less subjective. But it was shown that Mrs. O'Meara had lost weight and health, and there were symptoms of internal injuries which may be permanent. In view of the fact that the trial court refused to disturb the verdict, and because we

are not satisfied the verdict is excessive, we shall not disturb the judgment.

We find no prejudicial error. The judgment is therefore affirmed.

MORRIS, C. J., CHADWICK, ELLIS, and FULLERTON, JJ., concur.

[No. 13144. Department One. April 6, 1916.]

THE STATE OF WASHINGTON, *on the Relation of F. A. Kern, Prosecuting Attorney, Respondent,* v. LATHIE D. EMERSON, *Appellant,* MATTIE MCFADDEN, *Defendant.*[1]

CONSTITUTIONAL LAW—DUE PROCESS—NOTICE—PROSTITUTION—NUISANCE—ABATEMENT—PENALTY—LIABILITY OF OWNER. The provision of the "Red Light" law, 3 Rem. & Bal. Code, § 946-1 *et seq.*, making the owner of a house used for the purposes of prostitution liable in person and property for a fine of $300, to be entered as part of the decree of abatement, is unconstitutional as the taking of property without due process of law, where the owner was not in possession and had no notice, actual or constructive, of the purposes for which the house was being used.

DISORDERLY HOUSES—PENALTY—"TAX." The fine of $300 put upon the property of an innocent owner, in abatement proceedings under the "Red Light Law," being a charge in gross and not according to its value, is a penalty and cannot be upheld as occupation tax or a "deterrent."

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered July 3, 1915, upon findings in favor of the plaintiff, in an action to abate a nuisance. Reversed.

Wm. O. Lewis, for appellant.

F. A. Kern and *Newton Henton,* for respondent.

CHADWICK, J.—This is a proceeding to abate, as a nuisance, a certain dwelling house in the city of Ellensburg.

[1]Reported in 155 Pac. 579.

The complaint is based upon the act of 1913, ch. 127, Laws of 1913, p. 391 (3 Rem. & Bal. Code, § 946-1 *et seq.*), familiarly known as the "Red Light" law. The findings of the court are not disputed. The defendant Lathie D. Emerson was, prior to the 19th day of August, 1914, the owner of the property. On that date he entered into an executory contract of sale with defendant Mattie McFadden, who, since the first day of September, 1914, has lived in and maintained the dwelling house for the purposes of lewdness, assignation, and prostitution.

The defendant Lathie D. Emerson is a nonresident of the county of Kittitas, it being stated in the briefs that he has resided, at all times since the contract of sale was entered into, at the city of Ritzville, in this state. The court found as a fact that the defendant Lathie D. Emerson had no knowledge, information or notice, either actual or constructive, that a nuisance was being maintained upon the premises prior to the commencement of this action.

The defendant Emerson, who appeals, does not take issue with the conclusions of law and the decree of the court that the property shall not be hereafter maintained for the purposes mentioned, or that it shall be closed for a period of six months, but he does take issue and assigns as error, the decree of the court that a personal fine of $300 shall be assessed against him, to be paid within three months from the date of the judgment, together with the costs of the proceeding; the contention being that the facts found do not sustain the conclusions of law and the decree.

The concrete question presented by the record is whether an owner of property, who has contracted to sell it or who has leased it to another, is liable in person and in property for the tax or penalty, whichever it may be called, which the statute says shall be entered as a part of the decree of abatement.

The relator relies upon *State ex rel. Dow v. Nichols*, 83 Wash. 676, 145 Pac. 986; *State ex rel. Kern v. Jerome*, 80

Wash. 261, 141 Pac. 753, and *Tenement House Department v. McDevitt*, 215 N. Y. 160, 109 N. E. 88. We said in the *Dow* case:

"It is said, however, that the owners of the property had no knowledge of the existence of the nuisance. This is doubtless true. But the fact that the owners had no knowledge that prostitution was being carried on at the place mentioned, would furnish no reason why the court should not abate such nuisance if, in fact, it existed."

But the question here presented was not there discussed. We held that the court might abate the nuisance whether the owner had notice of its existence and continuance or no. This, a court of equity might do irrespective of the statute. In the *Jerome* case, the property had been used by the owner as a place of prostitution. She knew that the one she agreed to sell the property to, and had put in possession, was a prostitute. The only issue tried out, so far as she was concerned, was whether she had notice. This was clearly proven. She had her day in court and the court found her guilty, and the fine was rightfully imposed. This made due process of law, under the rule of *Hodge v. Muscatine County*, 196 U. S. 276, where a subsequent opportunity to have a remission of the tax was held to meet the constitutional guarantee of due process.

In this case, the owner is found to be innocent of actual participation in the maintenance, and without notice, actual or constructive, of the existence of the nuisance. So that we have an entirely different case. The *Hodge* case is apt authority in so far as the *Jerome* case is concerned, but it does not bear out the holding that the penalty or tax may be laid upon an unoffending owner—in person or in property —for that question was not within the facts. On the contrary, it was, after suggestion, passed by the court without decision.

This form of law by which an owner is made to suffer for the sins and omissions of his tenant is a modern creation. Its

first expression is to be found in the "Mulct" liquor laws passed by several of the states. These laws, so far as we have been able to inform ourselves, provided, in all instances, that the owner would be liable for the tax where the business was carried on by another, provided he had actual or constructive notice that his premises were used for the purpose of selling liquor. 23 Cyc. 150; *Morgan v. Koestner*, 83 Iowa 134, 49 N. W. 80; *State v. Lawler*, 85 Iowa 564, 52 N. W. 490; *State v. Severson*, 88 Iowa 714, 54 N. W. 347; *State v. Price*, 92 Iowa 181, 60 N. W. 514.

Following this law, came what is known as the "Cigarette" law. This law did not, as a rule, make any express provision as to notice and, so far as we are informed, the liability of an owner of property who is without notice to answer for a penalty has never been directly passed upon. *Hodge v. Muscatine County, supra; Cook v. Marshall County*, 196 U. S. 261.

Then came the "Red Light" law. This law was first adopted in Iowa, and thereafter in Washington, Minnesota, Nebraska, Illinois and possibly in other states. The Iowa law does not make the liability of an owner contingent upon notice, express or implied. Our law is the same as the Iowa law.

Whether the owner of a building where prostitution is practiced may be mulcted if he have no notice of its illegal use, either express or implied, has not been passed upon either in Iowa or Washington. In Nebraska, the court held in *State ex rel. English v. Fanning*, 96 Neb. 123, 147 N. W. 215, that the "Red Light" law, in so far as it assumed to put a tax upon an owner having no notice, was in violation of the constitution, although the unlawful use was enough to warrant an order of abatement, "even though the evidence as to the lack of knowledge on the part of the owner is such that it does not warrant an injunction or a judgment for costs against him." Saying further, that the owner could release

the property at once by giving the bond provided in the act. Our Laws, § 7 (3 Rem. & Bal. Code, § 946-7).

The law was before the supreme court of Minnesota at the suit of *State ex rel. Wilcox v. Ryder*, 126 Minn. 95, 147 N. W. 953. The court held, as we read the decision, that an owner who did not prove his innocence to the satisfaction of the court, and also inability to have acquired such knowledge by reasonable care and diligence, would be subject to the penalty or tax. With this holding we have no quarrel. But the supreme court of Nebraska, having the case of *State v. Fanning* still within its reach, in *State ex rel. English v. Fanning*, 97 Neb. 224, 149 N. W. 413, upon the authority of the Minnesota case, or, as we believe, upon a mistaken notion of the holding of that case, reserved its opinion as to the penal feature of the law.

Considering, then, that the Minnesota statute provides for notice, and that the question is still open in Nebraska, we turn to the decisions in New York. In *Tenement House Department v. McDevitt*, 85 Misc. Rep. 429, 147 N. Y. Supp. 941, the supreme court held that an owner of a building where prostitution had been practiced was not subject to the civil penalty of $300, in the absence of knowledge or notice, actual or implied. In that case no more than one or two acts of prostitution had been proven. Judge Bijur, who wrote the opinion, said:

"I am of opinion that a landlord of a tenement house cannot lawfully be held responsible merely because one or more acts of prostitution have been committed by a tenant or other person on the premises. It is evident that he could not prevent such acts without having an agent constantly present with every single person in the house. A requirement so oppressive would place a burden upon the ownership of this class of property, equivalent to substantial confiscation, and therefore be beyond the power of the state to impose. . . .

"Again, since the landlord cannot prevent such acts, to charge him with a penalty for their occurrence would be to punish him where he has omitted no legal duty and committed no wrong. . . .

"The provision in the law which we are discussing would, if interpreted as appellant claims, as I have shown above, neither prevent the commission of the offenses against which it is aimed, nor compensate anyone for such injury as might result from their commission."

On appeal, the court of appeals, in the same case (215 N. Y. 160, 109 N. E. 88), held that the imposition of the penalty was in the nature of a tax, or a petty penalty, and that there was "nothing that need shock any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest," citing many cases which, in our judgment, may be readily distinguished from the case at bar. The essence of the court's holding being:

"If the occupant of an apartment has used it for indiscriminate intercourse with men, has used it in the sense that she has kept or maintained it for that purpose (*Commonwealth v. Cook*, 12 Metc. 93; *State v. Ruhl*, 8 Ia. 447, 454), the diligent owner will seldom be blind to the offense. Looking, then, to the average results, the legislature has said that the owner must prevent at his peril a vicious use which can rarely be continued without his fault. It rules out inquiry into his excuses in the particular instance, because such excuses, if accepted, would tend to nullify the law. It frames its rules to meet the necessities of the average, rather than the exceptional case, and adjusts its penalties in correspondence with the common experience of mankind."

This reasoning, when the final holding of the court is considered, is not inconsistent with, but seems rather to be a statement of, the doctrine of implied notice. The judgment of the appellate division was affirmed upon the established fact that the acts complained of were isolated instances, not in themselves sufficient to put the owner upon notice. See *State v. Irvin*, 117 Iowa 469, 91 N. W. 760. The decision must be read in connection with § 151 and § 154 of the Tenement House Act, as amended. By these sections, an owner is made subject to the penalty if the tenement is used for the purposes of prostitution with the *permission* of the owner

thereof, or his agent, and in an action to establish the lien, etc., for a violation of the law relating to prostitution, etc., proof of the ill repute of the place or of the inmates thereof or persons resorting thereto, shall constitute presumptive evidence that the premises were so used with the "permission" of the owner or agent. The holding of the court seems to be no more than that a certain degree of diligence is put upon every owner of property who leases it, or puts another in possession of it, and that his permission, hence knowledge or notice, may be established by proving the general reputation of the place. The word permission, as there used, implies notice or knowledge. It is so held in the mulct liquor cases. *Larson v. Christianson*, 14 N. D. 476, 106 N. W. 51. See, also, holding on principle: *Lancaster Hotel Co. v. Commonwealth*, 149 Ky. 443, 149 S. W. 942, and many cases cited in "Words & Phrases," Title, "Permission."

It would seem that the ultimate holding in the tenement house case does no violence to any constitutional provision, and is consistent with sound reason. The suppression of a nuisance is essentially a proceeding *in rem*, and to hold an owner to constructive knowledge of the uses to which his property is put is not an unreasonable rule, for the order of abatement operates upon the property, and not upon the person. The suppression of a nuisance of which an owner has knowledge, or which is so long continued and under such circumstances that knowledge will be implied, is a burden attaching to the ownership of all property. The rule is as old as the law of nuisance itself. 29 Cyc. 1202; *Tenement House Department v. McDevitt, supra; Bohan v. Port Jervis Gas Light Co.*, 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711.

Hence it may be said, without fear of successful contradiction, that there is no case holding that an owner can be penalized under the "Red Light" law unless it can be said that he had knowledge or notice, either actual or constructive, of the practice of the things outlawed by the statute.

It will not be contended that an owner without notice is liable to pay the charge upon his property if it be a penalty. But it is said that the imposition is a tax which the owner of the property must pay as a "deterrent." As said in *Hodge v. Muscatine County, supra*, in construing the cigarette law:

"It is manifestly a tax upon the traffic which the legislature saw fit to impose, not for the purpose of giving countenance to the business, but as a deterrent against engaging therein. . . . It confers no right, but imposes an impediment to the transaction of the business."

A penalty cannot be converted into a tax by naming it a tax. The character of the imposition depends upon the purpose and objects of the law, and its results as they affect persons and property. It may be said to the credit of the legislature of Minnesota that it resorted to no subterfuge in drafting its Red Light law. It called the imposition a penalty, as, in truth, it is. A tax is a thing general in its application, a charge upon persons or property or classes of property. Taxes are designed and laid primarily for the support of the government, and their imposition implies a levy by the administrative officers of the government, equalization subject to judicial review, and payment into a fund previously established by law. Whereas, a penalty is a thing imposed by way of punishment for the violation of some statute. By the terms of the Red Light law, the charge is put upon property in gross, and not according to its value, and to hold that such a charge, when put upon an innocent owner, is an occupation tax or a "deterrent," is to defy all rules of construction, albeit, a penalty may be collected by civil process. Such a charge is always held to be a penalty when laid upon the innocent. The distinction between a tax and a penalty has been drawn in many decisions. They are cited in Words & Phrases under the titles, "Tax" and "Penalties."

But to inquire whether such a charge, as is here imposed,

is a tax or a penalty is a splitting of hairs, for the cigarette cases cited are not in conflict with our holding. For, whether the charge be held to be a penalty or a tax, it can be collected if there be due process of law—an opportunity to be heard before a proper tribunal. The cigarette law made such provision. Under it the owner may, within a certain time, make application for the remission of the tax. In the opinion of the court (*Hodge v. Muscatine County, supra*), it is noted that the defense there made, that the owner lived in the state of Illinois and had no knowledge whatever of the misuse of her property and never consented thereto, was unavailing because she did not allege that she did not have knowledge within ample time to make application for the remission of the "tax." The reasoning of that case would imply, at least, that whether the charge be a penalty or a tax, it could be collected if the owner were given an opportunity to contest its imposition for lack of notice. In this case, if the contention of the relator be sustained, there would be no opportunity to contest; the penalty would follow the simple fact of ownership, however innocent the owner might be.

Let us suppose that one who buys liquor rightfully sells it to a minor or an habitual drunkard, or to an Indian, and the statute provided that, in all cases, the first seller should be subject to a fine to be arbitrarily levied upon proof of the illegal sale. No man, whether lawyer or layman, would contend that the legislature had such power, unless it were shown as a fact that the original seller knew, or ought to have known, that his vendee intended to make an illegal sale, that is to say, that he was an accessory to the crime. It is so in this case. If a man rents his home, he has done a thing that he has a lawful right to do. If his tenant puts the property to an unlawful use, the tenant is guilty, but the penalty of his wrongdoing cannot be put upon the landlord unless he knew of the intended use, or the facts and circumstances are such as to make him, constructively, a party to the crime.

So that, assuming a penalty may be imposed upon one who is actually or constructively guilty of maintaining a nuisance, it does not follow that one who is not a party to it in any way can be charged. To do so would be to take the property of an unoffending citizen without due process of law.

The legislature has not assumed to go further than to make the property of a nonconsenting owner subject to penalty by closing it for a limited time. This is within the inherent powers of a court of equity. It is held, in nuisance cases, that a court has all power *in rem* to enforce its decrees, even to the destruction of the property.

We hold that the penalty of $300 may be imposed if the owner or his agent have actual knowledge of the misuse of his property, or, if the reputation of the place, when considered in the light of all the facts and circumstances, is such as to warrant a jury in saying that he should have known the character of the place, or the uses to which it was put; that is to say, he must have notice, actual or constructive.

The fact that the law does not provide, in terms, for notice, as did the mulct liquor laws to which we have referred, does not bear upon the case. To have so provided, would have been to say no more than the law demands.

The keeping of a bawdy house was an indictable nuisance at common law (Bishop, New Criminal Law, ch. 65), and to hold with respondent would put a greater burden upon an owner of property in an equitable proceeding than in a criminal action. It would be a thing unheard of and unparalleled in the history of jurisprudence.

The question is new and an open one in this state. We may reasonably expect that the law will be vigorously enforced and that the question discussed will frequently recur. For this reason, we have endeavored to reason it out along the lines of common sense and well established principles and as, we believe, the legislature intended. Any other conclusion would put a penalty, not upon a prohibited business, but upon

rightful and lawful ownership of property. Our holding, while having merit to hold every guilty person, will have the virtue of protecting the innocent, not only in their persons and property, but in their reputations. We are not unmindful, and the legislature was not unmindful, of the fact that there are thousands of good law-abiding Christian people in this state who own dwelling houses and other buildings, and who rent them to others. To charge them as parties to the maintenance of a house of prostitution, however innocent of wrongdoing, and without a showing of notice, actual or constructive, would be to shock all sense of justice and make the law a dragnet for virtue rather than a weapon for the slaying of vice; for no man can close his eyes to the fact that the penalty falls upon the property and reputation of the owner. The actual wrongdoer is generally, as shown by our own cases, irresponsible in property and without reputation.

The judgment is reversed, with directions to discharge appellant from the penalty in so far as it affects his person and property.

MORRIS, C. J., MOUNT, ELLIS, and FULLERTON, JJ., concur.

[No. 12994. Department One. April 8, 1916.]

H. C. STUHT *et al.*, *Appellants*, v. MARYLAND MOTOR CAR INSURANCE COMPANY, *Respondent*.[1]

INSURANCE—THEFT—INTENT—MISUSE OF AUTOMOBILE—POLICY. A policy insuring an automobile against loss or damage by "theft, robbery or pilferage" does not cover a loss when the car was wrecked while lawfully in the possession of an employee of a garage company under instructions to deliver it to the owner, although such employee went out of his way in making the trip, where he had no intent to steal or pilfer it; as the policy covers only intentional stealing.

Appeal from a judgment of the superior court for King county, Smith, J., entered March 26, 1915, upon the verdict of a jury rendered in favor of the defendant, in an action upon contract, after a trial on the merits. Affirmed.

Vince H. Faben, for appellants.

Clem J. Whittemore, for respondent.

MOUNT, J.—This action was brought to recover for the loss of an automobile upon an insurance policy, issued by the defendant to the plaintiffs, which policy insured the automobile against "Loss or damage, if amounting to $25 on any single occasion, by theft, robbery, or pilferage by persons other than those in the employment, service or household of the assured." Upon issues joined, the case was tried to the court and a jury. The trial resulted in a verdict and judgment in favor of the defendant. The plaintiffs have appealed.

The statement of the case contained in the appellants' brief is substantially in the following words: During part of July and August, the plaintiffs were absent from Seattle, during which time they left the automobile in charge of one Cook. Certain defects appearing in the mechanism, it was

[1]Reported in 156 Pac. 557.

returned for proper adjustment to the garage and workshop of the Mercury Motor Car Company, from whom it had been purchased, with the request that the automobile be returned by that company to the plaintiffs' garage when the defects should be remedied. This being accomplished, an employee of the Mercury Motor Car Company undertook to return the machine; but, instead of traveling direct from the company's garage on East Pike street in a northerly direction to the plaintiffs' home north of Woodland Park, it being Saturday evening, after working hours, this employee, Mr. Richardson, without the knowledge or authority of the company or these plaintiffs, and only for his own personal purpose, proceeded from the company's garage in a southerly direction toward his own home about five miles distant. When rounding the corner at Fourteenth avenue south and Norman street, on the side of Beacon Hill, and about a mile distant from the company's garage, Richardson drove the machine over a bank, and the result was a total wreck of the automobile. A more detailed statement of the facts will be found in *Stuht v. United States Fidelity & Guaranty Co.*, 89 Wash. 93, 154 Pac. 137. That was an action by these same plaintiffs against another insurance company upon another policy.

The appellants make three contentions: First, that failure to give notice of the accident cannot avail the company to defeat liability upon the policy; second, the policy contemplated a wrongful taking of any kind, and not necessarily a criminal taking; and third, the facts surrounding the use and destruction of the automobile by Richardson and of his not returning the automobile to the plaintiffs are not in dispute, and, therefore, there was no question to submit to the jury, and judgment should have been directed in favor of the appellants.

In view of our conclusion upon the last two contentions, we find it unnecessary to discuss the first. Upon the second contention, the appellants insist that the policy contemplates a

wrongful taking of any kind, and not necessarily a criminal taking. It will be noticed that the policy, as quoted above, insures against "loss or damage . . . by theft, robbery or pilferage by persons other than those in the employment, service or household of the assured." The words theft, robbery, and pilferage are well understood. They were used in this policy in their common and ordinary meaning. If the automobile was stolen, or if it was robbed or pilfered of any of its accessories, or of personal effects left therein, to the amount of $25, then the insurance company would be liable.

In the case of *Hartford Fire Ins. Co. v. Wimbish*, 12 Ga. App. 712, 78 S. E. 265, in construing a contract of insurance like the one now before us, the court said:

"The word 'pilfer' means to steal, and to charge another with 'pilferage' is the same thing as to charge him with stealing. *Becket v. Sterrett*, 4 Blackf. (Ind.) 499, 500. 'Pilferage' is but petty larceny. One cannot be convicted of either theft, robbery, or pilferage, unless he had the intent to steal. And we know of no authority for giving any different meaning to these words in a contract of insurance wherein it is stipulated that the company will be liable for loss or damage to an automobile, resulting from 'theft, robbery, or pilferage.' Under this contract, if the thief carries away a machine with intent to steal it, and it is never recovered, and loss occurs, the owner may recover the full value of the automobile. If the thief be apprehended and the machine recovered, then the owner is entitled to recover for whatever damage has been done the machine, if it exceeds $25. But in both cases it must appear that the person taking the machine intended to steal it. If he had the *animus revertendi*, he is not guilty of theft, or robbery, or pilferage, even though he took the machine without the owner's consent."

See, also, *Bigus v. Pacific Coast Casualty Co.*, 145 Mo. App. 170, 129 S. W. 982.

There is apparently no claim in this case that Mr. Richardson, who took the automobile, intended to steal it or rob the machine, or to pilfer anything therefrom. He took the automobile after it had been repaired at the shop where he

was employed, intending to return it to Mr. Cook. It is not claimed that Mr. Richardson was wrongfully in possession of the machine, and certainly, under the evidence, he did not intend to do a wrong. We are satisfied from the whole record, and from the statement of the appellants, as copied above, that there was no criminal intent, and that there can be no recovery under the policy, even though Mr. Richardson took the automobile under such circumstances without the consent of the owner.

The evidence of Mr. Richardson was to the effect that he was directed by Mr. Cook to deliver the automobile to Mr. Cook before 8 o'clock on the evening it was destroyed; that it was customary to deliver machines in that way; that he was taking the machine to Mr. Cook at that time. Mr. Cook denies that he directed Mr. Richardson to bring the automobile to him; but it is apparently conceded that Mr. Cook authorized some person to deliver the automobile to him upon that evening. That fact is of no importance in this case, because it was not shown that there was any intent on the part of Mr. Richardson to steal, rob, or pilfer from the machine. The evidence is conclusive that he did neither. The only evidence which might be construed as an intent to pilfer from or steal the automobile was the fact that Mr. Richardson went out of his way in taking the machine to Mr. Cook; but this fact was fully explained, showing no such intent. From the undisputed facts we are satisfied that the verdict of the jury was correct and that no other verdict could have been sustained.

The judgment appealed from is therefore affirmed.

MORRIS, C. J., ELLIS, CHADWICK, and FULLERTON, JJ., concur.

[No. 13013. Department One. April 8, 1916.]

CHARLES W. MACEY *et al.*, *Respondents*, v. BENJAMIN C. FURMAN *et al.*, *Appellants*.[1]

VENDOR AND PURCHASER—RESCISSION BY VENDEE—ESTOPPEL. Vendees, entitled to a deed containing personal covenants, are not estopped to rescind for failure of title by the fact that they orally agreed to take a deed from a third person who held the legal title, the vendors not being parties to such agreement and having no notice thereof, and the vendees deriving no benefit therefrom.

SAME—RESCISSION BY VENDEE—LACHES—ESTOPPEL. Vendees in a trade for land are not estopped by laches from rescinding for failure of title, where their delay was due to the vendor's request for time; since the vendors by delaying to answer are estopped to invoke delay as an estoppel against rescission.

SAME. Failure to abandon possession of land improved by mistake, does not estop the vendee from rescinding for failure of title.

SAME—MISTAKE—REMEDIES OF VENDEE—RESCISSION OR REFORMATION. Rescission, and not reformation of a deed to another tract originally given by mistake, is the vendee's proper remedy where the vendors had no title to the land pointed out and actually purchased.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered May 7, 1915, upon findings in favor of the plaintiffs, in an action for rescission, tried to the court. Affirmed.

Parker & Holden, for appellants.

E. B. Velikanje, *Milan Velikanje*, and *R. B. Milroy*, for respondents.

ELLIS, J.—Action commenced in December, 1914, to rescind a partially performed contract and for damages. The court found the following facts: In October, 1912, the parties entered into a contract whereby plaintiffs agreed to exchange a span of mares, their halters, and collars, for a certain five-acre tract of land then identified by the parties

[1]Reported in 156 Pac. 548.

by actual observation on the ground, and fifty dollars in money. Pursuant to the contract, plaintiffs delivered the personal property to defendants, who paid the fifty dollars and conveyed to plaintiffs another five-acre tract described as the east half of lot 2, of Zillah Heights Ranch, in Yakima county, which the parties believed was the correct description of the land identified and agreed to be conveyed, but the correct description of which was, in fact, the east half of lot 1, of Zillah Heights Ranch. Plaintiffs entered into the contract and parted with their personal property in reliance on defendants' statement that they owned the land identified, when in fact they did not have the legal title to that land but had purchased it from Cornelius Furman, father of defendant Benjamin C. Furman, had paid for it, taken possession of it, and had received from him a deed to the east half of lot 2, in the mutually mistaken belief that such was the correct description. Defendants were in actual possession and equitable owners of the east half of lot 1, when they made the contract with plaintiffs, but the legal title was still in Cornelius Furman.

In April, 1914, plaintiffs first learned of the true situation, and on April 16, 1914, through their attorney, apprised defendant husband of the mistake and requested a return of their mares, halters, and collars, but defendant stated he would do nothing in the premises until he could consult his lawyer. In October, 1914, plaintiffs tendered to defendants $70 in gold, and their deed reconveying to Benjamin C. Furman the east half of lot 2, and demanded from him a restoration of their personal property, which tender and demand defendants refused.

From October, 1912, to sometime in February, 1915, plaintiffs were in actual possession of the land agreed to be conveyed, cared for the orchard, raised one crop of corn, built and used a barn and dug a cistern thereon, thus appreciating the value of the land in the sum of $250. Shortly after this action was commenced, defendants made and tendered to

plaintiffs a deed of the east half of lot 1, by a correct description, which deed plaintiffs refused to accept; and in January, 1915, Cornelius Furman deeded to defendant husband, also, by a correct description, the same land.

Late in April or early in May, 1914, plaintiff Charles W. Macey orally agreed with Cornelius Furman to deed to him the east half of lot 2, if he would deed to Macey the east half of lot 1, and soon after Cornelius Furman did sign a deed containing apt words to convey to plaintiffs the last described land, told Macey he had done so and would deliver it to plaintiffs upon receiving their deed to him of the east half of lot 2. Macey then told Cornelius Furman that plaintiffs would make such deed, but they have failed to do so.

At the time of the transfer of the mares, one of them was with foal, since born; and when this action was commenced, the sheriff of Yakima county, pursuant to a claim and delivery affidavit and bond made and furnished by plaintiffs, seized the mares, halters, and collars, and delivered them to plaintiffs, who ever since have had and still have them.

The court concluded, as matter of law, that plaintiffs are entitled to retain the personal property in question and to recover from defendants the amount of their permanent improvements on the land less $50 paid by defendant, to wit, $200. Judgment and decree went accordingly. Defendants appeal, bringing the case here on the court's findings to which they took no exception, contending only that they do not support the conclusions of law and decree.

I. Appellants' main claim is that respondents are estopped to rescind by the fact, as found, that, soon after respondents discovered the mistake, they orally agreed with the elder Furman to take his deed which would have vested in them the full legal title to the land of which they already had the equitable title. But the court did not find that the appellants were parties to this agreement, or even knew of it, and their answer negatives such knowledge. They there aver that they were ignorant of the fact that the elder Furman's deed to

them did not convey the east half of lot 1, which they had agreed to convey to respondents, until January 28, 1915. They were advised of the mistaken description in their own deed to respondents, and that respondents were insisting on an amicable rescission because of it, as early as April 16, 1914. Yet, from then until after this action for rescission was actually commenced in December, 1914, they made not a move to correct the mistake but put the respondents off with a request for time to see their lawyer. Their inaction could not have been the result of an agreement to which they were strangers and of which they were ignorant, nor could they have been in any degree influenced or prejudiced by it. Certainly, so far as appellants were concerned, the agreement with the elder Furman was wholly lacking in consideration. As against them, respondents were entitled, under their contract, in any event, to a deed from appellants themselves containing their personal covenants in usual form. This right was not waived by a contract of which they were ignorant and because of which it is self-evident they did not alter their position for the worse. The respondents derived no independent benefit from the agreement with the elder Furman, and appellants suffered, and could have suffered, no detriment from the failure of its consummation. The circumstance relied upon is lacking in every element of equitable estoppel. *Peck v. Peck*, 76 Wash. 548, 137 Pac. 137, and many of our own decisions there cited. They were, in any event, obligated to convey.

II. Equally abortive is the claim that respondents were guilty of laches in rescinding. They called attention to the mistake immediately on discovering it, and requested an amicable rescission. It would have been idle to demand a deed when appellants could not have conveyed title. Appellants did not definitely refuse to rescind, but requested time to consult their lawyer. Respondents were justified in waiting a reasonable time for an answer. The answer never came, and appellants never expressed a willingness to correct

the mistake nor tendered any deed until after suit. Even then, they had no title. Appellants, by their own inaction inducing respondents to delay, are estopped to invoke that delay as an estoppel against rescission. Nor did respondents' failure to abandon possession of the land estop them to rescind. *Snarski v. Washington State Colonization Co.*, 53 Wash. 221, 101 Pac. 839.

III. We find no merit in the assertion that respondents mistook their remedy and should have brought an action for reformation of the deed originally received from appellants. Reformation would have been no remedy. Respondents had no title upon which a reformed deed could operate.

IV. An argument is based upon the claim that respondents were to take the land subject to a mortgage which had been foreclosed, or was in process of foreclosure at the time of trial. The court, however, made no finding on the subject and the evidence is not before us. We shall not notice this point further than to say that the existence of the mortgage and the imminence of its foreclosure would furnish an added reason why respondents should have been furnished a deed conveying title in order that they might protect themselves by paying the mortgage or redeeming from the foreclosure.

We are clear that the trial court reached the correct conclusion on the facts found.

Affirmed.

MORRIS, C. J., CHADWICK, and MOUNT, JJ., concur.

[No. 13029. Department One. April 8, 1916.]

LEO BROWN *et al.*, *Respondents*, v. JOHN J. EHLINGER *et al.*, *Appellants*.[1]

CONTRACTS — CONSTRUCTION — DETAILS — PERFORMANCE—EXCUSE—PREVENTION BY LAW. Although a written contract, complete in itself, for the crushing and removal of rock upon certain lots, provided that the rock crushing plant might occupy the premises, nonperformance is not excused, as being prevented "by law," by reason of an injunction obtained by an adjoining landower preventing operation of the crusher installed on the lots; since such occupation was a mere detail of performance and not of the essence of the contract.

SAME—PERFORMANCE—CONSTRUCTION—INTERLINEATIONS. The fact that the clause whereby the owner of the lots agreed to the crushing of rock thereon and agreed to add sufficient machinery to complete the work was interlined does not change the construction to be given to the contract, the interlineation or correction not being challenged for fraud.

APPEAL—REVIEW—FINDINGS. A finding on conflicting evidence will not be disturbed where the evidence does not preponderate against it.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered February 4, 1915, upon findings in favor of the plaintiffs, in an action on contract tried to the court. Affirmed.

Danson, Williams & Danson (*Geo. D. Lantz*, of counsel), for appellants.

Smith & Mack, for respondents.

CHADWICK, J.—Respondents brought this action to recover for a breach of contract to remove the rock from certain lots of land. The questions raised by the appellants compel us to set out the greater part of the written contract which the parties entered into.

"Whereas, first parties are desirous of clearing and excavating a twelve-foot basement on said lots Nine, Ten,

[1]Reported in 156 Pac. 544.

Eleven and Twelve of Block Thirty-seven of said Railroad Addition, and removing the rock and other material therefrom to the depth of twelve (12) feet from the curb line of Third Avenue, and also removing the rock and other material one-half of the width of the alley down to the street grade in the rear of said lots Nine, Ten, Eleven and Twelve and,

"Whereas, first parties are desirous of paying for the work and labor of removing said rock and other material by giving in exchange the lots in said Boston Heights Addition above described and also that certain rock crushing plant now on said lots above described in Railroad Addition,

"Now, Therefore, in consideration of the mutual promises hereinafter contained, it is hereby agreed between the parties hereto as follows:

"The second parties hereto agree to remove all rock and other material on the above described Lots Nine, Ten, Eleven and Twelve in Block Thirty-seven of Railroad Addition to the city of Spokane, Washington, to a depth of twelve (12) feet below the level of Third Avenue adjacent to said lots, and further to remove all rock and material from one-half of the width of the alley in the rear of said lots, down to the street level, between Madison and Monroe streets, and second parties agree to do all necessary blasting and to furnish and supply all necessary labor and material and to perform all work in the removal of said rock and other material from said premises above described in the manner hereinbefore stated at the cost and expense of said second parties, said work to be completed by January 1st, 1914. . . .

"The parties of the first part hereby agree to permit second parties to use the rock crushing plant now upon said premises, and also the two rock trucks and one dump wagon thereon, and to occupy said lots or any of them with said rock crushing plant for the purpose of removing said rock and other material and crushing rock thereon and second party agrees to add sufficient machinery to complete said work during the life of this contract, and that upon the removal of all of said rock as hereinabove provided the said rock crushing plant, including the two rock trucks and one dump wagon hereinabove described, shall become the property of the second parties, said second parties to assume and

pay all personal property taxes now or hereafter assessed against said personal property."

Appellants rest their defense upon what they claim to be a collateral understanding going to the consideration of the contract, and upon the fact that, while engaged in the work, they were enjoined at the suit of an adjoining property owner from operating the rock crusher which had been installed upon the property.

Respondents insist that the contract is complete in itself and is not to be varied or controlled by oral testimony. Appellants insist that it was the understanding of the parties that the work of crushing and preparing the rock for the market should be done on the premises, and that the contract is so far ambiguous or uncertain as to admit of parol testimony, or if not uncertain in its meaning, that the only fair deduction to be drawn from its stated terms is that the rock was to be crushed on the premises, and that appellants, having been prevented by "the law" from completing the contract, there can be no recovery. The part of the contract particularly relied upon is:

"The parties of the first part hereby agree to permit second parties to use the rock crushing plant now upon said premises, and also the two rock trucks and one dump wagon thereon, and to occupy said lots or any of them with said rock crushing plant for the purpose of removing said rock and other material *and crushing rock thereon and second party agrees to add sufficient machinery to complete said work* during the life of this contract, and that upon the removal of all of said rock as hereinabove provided the said rock crushing plant, including the two rock trucks, and one dump wagon hereinabove described, shall become the property of the second parties, said second parties to assume and pay all personal property taxes now or hereafter assessed against said personal property."

It would seem that no argument or citation of authority is necessary to show that the writing purports to be a complete memorandum of the agreement of the parties.

We are asked to put ourselves in the place of the parties at the time the contract was executed. Respondents were the owners. Their purpose in entering into the contract was to clear their property of rock and to a depth of twelve feet. Appellants were in the business of crushing and selling rock, and entered into the contract, not entirely in consideration of the city lots that were to be conveyed to them, but also because they were securing a supply of native rock to be resold or manufactured into crushed rock. It was no doubt the understanding of the parties that the rock was to be crushed on the premises, and it may be that the appellants would not have entered into the contract if they had not understood that they could crush the rock on the premises. And it may be—it no doubt was—the intention of the respondents to allow the crusher to be operated upon their lots pending the removal of the rock, but these are mere details of performance. They do not go either to the essence or the subject-matter of the contract. Courts cannot set aside contracts because the performance of them becomes more difficult or more expensive than when they were entered into. If it were so, few contracts would survive the seasons of depression that periodically recur in the business world. The testimony in this case shows that the market for rock and crushed rock had gone to pieces after the appellants had agreed to remove the rock, or had established a base of supply, whichever way the case may be stated.

These observations distinguish this case from *Adams v. Washington Brick, Lime & Mfg. Co.*, 38 Wash. 243, 80 Pac. 446. The subject-matter of the contract there considered was a lease of a deposit of clay, at a minimum rental, and with a royalty upon all brick manufactured by the lessee. The lessor had an interest in the manufactured product, and had so far reserved his interest that the parties had agreed that the premises could not be used for any purpose other than the manufacture of brick. The clay deposit was exhausted before the term had expired. It was properly held

that the subject-matter of the contract having ceased to exist, the lessor could not recover.

"It was the existence of the clay that occasioned the making of this lease or contract. The possibilities based upon the assumed extensive existence of said clay prompted these parties to enter into this agreement. The contract was drawn upon the assumption that the clay would last five years. It did not. When it became exhausted, the essence of the entire transaction was gone. That upon which they had planned their operations vanished. The essential, indispensable item was no longer attainable. The foundation of their undertaking was gone. That which was the paramount consideration of the contract failed. While the instrument is a lease in outline, yet its provisions show that brickmaking, instead of being a mere incident, was the prominent purpose contemplated." *Adams v. Washington Brick, Lime & Mfg. Co., supra*, p. 249.

In the same opinion, at page 247, it is said:

"In construing the language of a written contract, that construction should be accorded which is most in consonance with the paramount purpose of the parties at the time of executing the same. It will be assumed that the parties had a purpose in entering into the contract. If the language is susceptible of two or more constructions, it should be given that which would best adapt the agreement to facilitate the accomplishment of the ends evidently sought to be attained."

In the case at bar, the manner of executing the contract, the several purposes of which have been hereinbefore stated, was, in no sense, the "essential indispensable item." The crushing of the rock into a manufactured product, in which, by the very terms of the contract, respondents had no interest or ownership whatever, was a collateral item, a detail affecting the cost of the work which appellants had assumed to do.

And, by the same reasoning, it must be held that appellants are not to be excused because the operation of the rock crusher was enjoined at the suit of some private litigant. Appellants assume that the contract provides that the rock shall be crushed on the premises, and that "the law" has made per-

formance impossible. The rule, as contended for, seems to be that a person will be excused from the performance of a contract where the performance becomes impossible through the act of God, "*the law*," or by the acts of the other party to the contract. We might profitably inquire into the meaning of the words, "the law" as they are employed in the text books and cases; the question being whether they refer to legal proceedings instituted by a private litigant, or whether the law refers to some statute which would make the execution of the contract an illegal thing, or possibly to an action begun by or on behalf of the public. It would seem like an extraordinary proposition to hold that one who had assumed to do a particular work, and who, in the performance of his contract, so conducted his operations as to make of them a nuisance, could, in turn, insist that a decree declaring his methods to be tortious to his neighbor was either the act or operation of the law; for it is a settled principle that every legal act may be done in a negligent manner or in such a manner as to be a nuisance to others. To apply the rule, we must hold that the place of crushing the rock is of the essence of the contract. We have demonstrated that it is not. Respondents had no interest in the crushed rock and, from the nature of things, could have no concern whether the rock was crushed on the premises or elsewhere. It is only those items or elements in a contract which are seasoned with mutuality that may be called of the essence of it.

Although questioned by counsel, the following cases sustain the holding of the trial judge: *Union Contracting & Paving Co. v. Campbell*, 2 Cal. App. 534, 84 Pac. 305; *Sample v. Fresno Flume & Irr. Co.*, 129 Cal. 222, 61 Pac. 1085. The cases relied on to establish a contrary holding do no violence to our conclusions, if we treat the place of manufacture as a detail and not of the essence of the contract. It appeared in the injunction proceeding, as in this one, that appellants had used the place and crusher to crush rock hauled from other places, and they will not now be heard to

say that they could not haul the rock from these premises to some other place and crush it and sell the same at a profit. Whether there is or is not a market for the rock, is a matter of no concern to the respondents. That is a hazard everyone who buys or manufactures for the purpose of sale takes upon himself.

Nor do we think, as appellant insists, that, because the words "*and crushing rock thereon and second party agrees to add sufficient machinery to complete said work*" were interlined, this circumstance gives them the right to open the door and prove that the right to operate the crusher on the lots was the basis of the agreement. Where an alteration or an interlineation appears in a contract and is alleged to be fraudulent or made without the knowledge or consent of a party, courts inquire most freely, not because of the mere fact that there is an interlineation, but because they must first inquire whether the writing is indeed the contract of the parties; whether their minds have met. Where the interlineation is not challenged as fraudulent or as inserted without warrant, it is a part of the contract. It is incorporated into the body of the contract and is subject to the same rules of construction as other words and phrases. As we read the quoted words, they add no element of ambiguity calling for interpretation. When considered in the light of the whole contract, they evidence no more than an intent on the part of appellants to save all future question as to their right to operate a crusher on respondents' land. They voice a permission, not a condition.

The trial judge found the total yardage to have been 37,000. Appellants insist that it was no more than 32,000 yards. There is a dispute in the testimony, and we are not prepared to say that the finding is not sustained by a preponderance of the evidence.

Affirmed.

MORRIS, C. J., MOUNT, ELLIS, and FULLERTON, JJ., concur.

[No. 13087. Department One. April 8, 1916.]

THOMAS SPRATT, *Respondent*, v. NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*.[1]

RELEASE—IMPEACHING—EVIDENCE — SUFFICIENCY. The testimony to overcome a written release of damages must be clear and convincing, especially where the signer "was at himself;" and is insufficient, where it appears that he was intelligent, sought the settlement, and then asked for a life job, and he alone testified that he signed under a misunderstanding and promise of a life job, two witnesses testifying that the release was read and explained to him.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 29, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover for personal injuries sustained by a railroad employee. Reversed.

Cannon & Ferris, for appellant.

Zent, Powell & Redfield, for respondent.

CHADWICK, J.—Respondent fell from a car and was injured. The result of the injury is what is known as "flat foot." Our conclusions upon a collateral question makes a statement of the facts unnecessary and relieves the court of a consideration of the merits of the case, such as negligence, contributory negligence, and assumption of risk. Some four weeks after respondent was hurt, he went voluntarily to the claim agent of the appellant, and after making his demands known and after admitted negotiations, signed the following release:

"RELEASE OF DAMAGES

"Know all men by these presents, That in consideration of the sum of one hundred fifty ($150) dollars, to me in hand paid by the Northern Pacific Railway Company, the receipt whereof is hereby acknowledged, I have released, acquitted

[1]Reported in 156 Pac. 563.

and discharged, and by these presents do release, acquit and forever discharge, the said Railway Company, its successors and assigns, of and from any and all cause or causes of action, costs, charges, claim or demand of whatever name or nature, in any manner arising or to grow out of the personal injuries received by me at Spokane, Washington, on or about June 28th, 1914, while working in the employ of said company as a laborer I met with an accident, and was injured,

"The receipt of said sum of one hundred fifty ($150) dollars being hereby acknowledged to be in full payment, satisfaction and discharge of any and all such cause or causes of action, costs, charges, claim and demand arising or growing out of said injuries now known or hereafter to become known, and in full compromise settlement of any and all liability of said Railway Company on account thereof.

"In witness whereof, I have hereunto set my hand and seal this 31st day of July, A. D. 1914."

Respondent contends that he is not bound by the release because, notwithstanding its plain terms, he was under the impression that he was simply signing a paper equivalent to a pay roll, the same as if he were signing for his pay check; that he signed it with an understanding that he was to have an assured employment in the future. To use his own words:

"Then I asked him for a job and I asked for a lifetime job. He said he couldn't give me that but I could go back to work, and bump any men on the job that I wanted, and I could work as long as I wanted to, have a job as long as I wanted to work."

The claim agent and another say that the release was read and explained to respondent. It is admitted that the claim agent told respondent that he would see the agent and see if there was anything he could do.

Releases in a case of this kind are like any other writing, and they are not to be lightly overcome. *Nath v. Oregon R. & Nav. Co.*, 72 Wash. 664, 131 Pac. 251; *Garver v. Great Northern R. Co.*, 56 Wash. 519, 106 Pac. 192; *Golle v. State Bank of Wilson Creek*, 52 Wash. 437, 100 Pac. 984. The testimony should be clear and convincing, especially so

where, as in this case, the issue strips down to one charge that the one seeking to overcome it did not understand the paper which he admits was read to him. His case would even fall within the rule contended for by Judge Dunbar in his dissenting opinion in *Pederson v. Seattle Consol. St. R. Co.*, 6 Wash. 202, 33 Pac. 351, 34 Pac. 665. The dissent was based on the fact, not that the plaintiff could not read or write or that the writing had not been sufficiently or truly explained, but because he was sought out by interested ones and a release obtained, "while the man was lying mangled and shocked by the injury, before his wounds were dressed or his mind composed," and in consequence he was incapable of contracting. No such condition appears in this case. Respondent was at himself.

In *Miller v. Spokane International R. Co.*, 82 Wash. 170, 143 Pac. 981, there was testimony to sustain the plaintiff's contention that the release was not read. We held it was for the jury to say whether an inference of fraud followed the facts. Respondent admits the dissimilarity of this case.

Taking into consideration the facts as testified to by the witnesses, the attending circumstances, and the reasonable inferences and probabilities, it would seem that respondent has not sustained the burden that is upon him to overcome his waiver. Respondent, although he says that he was unable to read or write, was an unusually adroit witness. He followed the theory of counsel in his answers with consummate skill. He speaks as correctly as the average witness, if not more so. He went to the claim agent seeking a settlement. He was in full possession of his faculties. He was not sought out by a claim agent and importuned or harassed into a settlement at a time when he was in pain or peril or under the influence of opiates as in several cases where similar releases have been set aside. The law neither prevents nor denies the right to contract for a release with an illiterate person. As against a showing that the contract was read and voluntarily executed; that there was no active attempt to mislead or

deceive; that the party seeking to overcome it was not laboring under the duress of pain and suffering; that he was not under the influence of narcotic drugs, and was himself seeking the settlement that was made; the testimony of the claimant, who alone testifies that he signed under a misunderstanding, is insufficient to pass the case beyond the rule of clear and convincing evidence.

Reversed and remanded with instructions to dismiss.

MORRIS, C. J., MOUNT, ELLIS, and FULLERTON, JJ., concur.

[No. 13213. Department One. April 8, 1916.]

DORCAS SCRIBNER, *Executrix, et al., Respondents*, v. E. E. PALMER, *Appellant*.[1]

APPEAL—REVIEW—AMENDMENTS. Where evidence admitted without objection, justifies a trial amendment, the complaint will, on appeal, be deemed amended to conform to the proof.

FRAUD—EVIDENCE—ADMISSIBILITY. In an action for fraud and misrepresentations to the effect that a certain land contract was "gilt-edged," security, evidence of the value of the land is relevant and material,

EVIDENCE—TESTIMONY OF DECEASED WITNESS AT FORMER TRIAL—OBJECTIONS. Under Rem. & Bal. Code, § 1247, making admissible the certified stenographer's report of the testimony of any witness, since deceased, given at a former trial, both direct and cross-examinations are admissible at a subsequent trial, if not subject to any objection which was properly made and improperly overruled on the first trial in favor of the same party making the same objection.

APPEAL—REVIEW—HARMLESS ERROR. Error in the admission of evidence of a mortgage is not prejudicial when the existence of the mortgage was admitted.

FRAUD—EVIDENCE—ADMISSIBILITY. Where a witness had denied that he was in any way instrumental in inducing a fraudulent deal, but had written a letter showing intimate relations with one of the parties, cross-examination as to his motive in writing the letter is admissible as testing the truth of his denial.

[1]Reported in 156 Pac. 531.

WITNESSES—CROSS-EXAMINATION—FRAUD. In an action for fraud, broad latitude is allowable in the cross-examination of the parties, and technical objections as to its extent having little bearing on the result are not ground for reversal.

APPEAL—REVIEW—DECISION—LAW OF CASE. A decision as to the sufficiency of the evidence upon a former appeal becomes the law of the case, and conclusive upon a second appeal where the evidence was the same in all material particulars.

Appeal from a judgment of the superior court for Spokane county, Wright, J., entered September 25, 1915, upon the verdict of a jury rendered in favor of the plaintiffs, in an action in tort, after a trial on the merits. Affirmed.

O. C. Moore, for appellant.

Merritt, Lantry & Merritt, for respondents.

ELLIS, J.—Action by the principals to recover damages for fraud claimed to have been practiced by their agent in a sale of real estate. The first trial resulted in a verdict and judgment for plaintiffs. Upon appeal, that judgment was reversed on the ground that an erroneous measure of damages had been applied, and the cause was remanded for a new trial. *Scribner v. Palmer*, 81 Wash. 470, 142 Pac. 1166. After the first trial, Charles M. Scribner died. His wife, Dorcas Scribner, as executrix of his will, was substituted as plaintiff. The second trial also resulted in a verdict and judgment for plaintiffs. Defendant again appeals. The facts touching this controversy are stated in full in our former opinion. That statement is adopted as the statement here.

I. It is contended that the court erred in admitting evidence as to the character and value of the Oklahoma land, over appellant's objection to its relevancy and materiality. This claim is based upon the now admittedly mistaken assertion that "the Oklahoma land was not, nor any interest therein, transferred to the Scribners." The land was conveyed by Hodge to the Scribners and the deed delivered at the same

time that the Hall contract of purchase was assigned to them, and as a part of the same transaction. True, this fact was not pleaded, but it was brought out on cross-examination of appellant himself, without objection on any ground. It was an admitted fact of which appellant was at all times cognizant. This evidence would have justified a trial amendment, and we are warranted in treating the complaint as amended to state the admitted fact. The evidence as to the character and value of the Oklahoma land was palpably both relevant and material to the question of damages. On the first appeal, we held that the measure of damages was not the balance due upon the Ball contract, but the difference in value between the property sold by respondents and the contract taken by them in reliance upon appellant's representations. The value of the contract was, of necessity, largely dependent upon the value of the land covered by it. The vital materiality of the evidence of that value is emphasized, rather than weakened, by appellant's claim that Ball could forfeit his payments on the contract without incurring further liability. It had a plain bearing upon the appellant's representation that the contract was a gilt-edged security. True, the appellant did not represent that he knew anything as to the value of the land, but there was evidence that he did represent that the contract was "gilt-edged." The evidence as to the value of the land was not only admissible, but its exclusion would have been positive error.

II. Charles M. Scribner testified at the first trial. He was submitted to a rigorous cross-examination in which were elicited certain matters of which parol testimony was not the best evidence and certain hearsay statements as to Ball's financial condition. He having died before the second trial, the stenographic report of his testimony, both on direct and cross-examination as given at the first trial, was read in evidence at the instance of respondents, pursuant to Rem. & Bal. Code, § 1247 (P. C. 81 § 1127). Upon the overruling of appellant's objections to the above mentioned matters, on the

ground that they were hearsay and not the best evidence, he now predicates several assignments of error. He argues, in substance, that, because the testimony was on the second trial offered by respondents, it all became direct testimony, and therefore subject to his objection as to its competency. The argument is attractive but unsound. The matters objected to were elicited by appellant himself at the first trial. He could not then have had them stricken on the ground of incompetency. They thus became legitimately an integral part of the testimony of the deceased witness and as such, under the statute, admissible at the second trial. The statute, Rem. & Bal. Code, § 1247 (P. C. 81 § 1127), declares:

"The testimony of any witness, deceased, . . . given . . . in a former trial of the same cause . . . when reported by a stenographer . . . and certified by the trial judge, . . . may be given in evidence in the trial of any civil action . . . where it is between the same parties and relates to the same matter."

It is *the testimony of the deceased witness given in a former trial*, not some part of it, which is, in plain and positive terms, made admissible at the second trial. The statute leaves no room for construction.

It may be that such evidence would be subject to any objection which was made and improperly overruled on the first trial in favor of the same party making the same objection at the second trial. It might, with reason, be argued that such evidence, when originally admitted over a proper objection, became no valid part of the testimony at the first trial. On that point, we hazard no opinion. Such is not the case here. The evidence here objected to was not subject to the objections now made on appellant's part when it was admitted at the first trial. Its character as proper and binding cross-examination was not changed to improper direct examination, subject to a motion to strike, by being offered as a part of the testimony of the deceased on the second trial.

We are not impressed with the argument based on a supposed analogy to the proof allowed at common law by oral testimony of statements made in the testimony of a since deceased witness given at a former trial. Such evidence was subject to every objection that could have been made had the witness been present and testifying in person. 1 Greenleaf, Evidence (16th ed.), p. 276, § 163. There is a reason for this not found in the application of our statute. A witness would hardly be able to recall the exact nature of objections, often technical, made at the former trial, nor the court's rulings thereon. This would not apply to a stenographic report certified by the trial judge himself. Our statute was passed with the full knowledge and in the light of the common law rule. Had the legislature intended to preserve that rule as applied to the stenographic report, it would doubtless have said so. It did not say so, and we have neither the power nor the inclination to speak where it was silent. But even at common law, the witness testifying on a second trial as to what was said by a deceased witness at the former trial must be able to state the *substance of all that the deceased witness said.* If he can recall only what was said on the examination in chief, but not what was said on cross-examination, none of the testimony is admissible. 1 Greenleaf, Evidence (16th ed.), p. 287, § 165. Even at common law, cross-examination is still cross-examination when offered as proof of former testimony at a second trial.

The question being one of first impression, and no decision of any court directly applicable having been cited, we have felt impelled to state thus fully our reasons for holding the evidence of the deceased witness admissible in its entirety.

III. The court permitted the reading of a deposition of the recorder of deeds of Jackson county, Oklahoma, into which the witness had read from the record in his office the mortgage on the Oklahoma land referred to in the Ball contract and in that contract assumed by Ball as a part of the purchase price. This was objected to on the grounds that it

was immaterial, irrelevant, and not the best evidence. It is urged that the mortgage could only be proved by a copy exemplified as provided by § 906 of the revised statute of the United States. We find it unnecessary to pass upon this question. The existence of the mortgage, though not admitted in the answer, was disclosed by the Ball contract and was admitted at the trial. The admission was made by counsel for appellant at the time this deposition was read and as a part of his objection. Even assuming that the proof made by the deposition was not technically correct, the error was not prejudicial. There is nothing in the claim that the jury might have inferred that a part of the fraud charged was the concealment of this mortgage. Charles M. Scribner had already testified that he knew of its existence from the beginning and that both Palmer and Hodge told him that Ball had assumed it.

IV. Counsel vehemently protests against the action of the trial court in permitting a cross-examination of appellant as to his motive in writing a letter to Scribner inclosing certain shares of stock. The letter is set out in full in our former opinion. The objection is based upon the ground that appellant was not questioned as to this letter in his direct examination. This is true; but, in direct examination, he had denied that he had anything to do with closing the deal between Hodge and the Scribners further than to bring them together. He had said, in substance, that he did nothing to influence the deal. As stated in our former opinion, the letter was properly admitted as showing the intimate relation of the parties. The cross-examination as to his motive in writing it was clearly permissible as testing the truth of his claim that he was in no wise instrumental in inducing respondents to make the deal.

V. It is likewise claimed that the court erred in permitting cross-examination of the appellant as to his attempts after the closing of the deal with the Scribners to sell the Scribner

property for Hodge. He admitted that Hodge had never listed the land with him for that purpose. The relations between Hodge and the appellant were material, in view of the appellant's claim in his examination in chief that whatever representations were made inducing the Scribners to part with their land were made by Hodge. As bearing upon that relation, the fact that the appellant, without specific authority from Hodge, attempted to sell the land, tended to show an intimacy between the parties, if not an actual interest in passing the property into the hands of innocent purchasers. Where fraud is the gravamen of an action, a broad latitude is always indulged in the cross-examination of both parties. We cannot say that the proper limit was exceeded in this instance. Two juries have found against the appellant on the primary question of fraud and upon the same evidence as to the main facts. We should be slow to set aside the verdict on technical objections touching the extent of the cross-examination, which we are convinced had little, if any, bearing upon the result.

VI. Finally it is argued at great length that the court erred in overruling the motions for a nonsuit and for judgment *non obstante veredicto*. These motions were based upon the claim that the respondents' evidence was insufficient to take the case to the jury upon the primary issue of fraud. The respondents' evidence touching that issue was in all material particulars the same on the second trial as on the first. The same contention was made touching the sufficiency of the same evidence on the first appeal as now. We then held that "the court did not err in overruling the motion for a nonsuit and in refusing to direct a verdict." As to the sufficiency of the evidence to make a case for the jury, our decision on the first appeal settled the law of the case. *Perrault v. Emporium Dept. Store Co.*, 83 Wash. 578, 145 Pac. 438, and cases there cited; *Smith Sand & Gravel Co. v. Corbin*, 89 Wash. 43, 154 Pac. 150; *Hoffman v. Watkins*, 89 Wash. 661, 155 Pac. 159.

A most careful consideration of the entire record and of every point discussed in the briefs convinces us that no error was committed which would warrant a reversal.

The judgment is affirmed.

MORRIS, C. J., CHADWICK, MOUNT, and FULLERTON, JJ., concur.

[No. 12598. Department One. April 11, 1916.]

F. G. MONROE, *Appellant*, v. DAVID RANKIN *et al.*, *Respondents*.[1]

CONSPIRACY—TO DEFRAUD—EVIDENCE—SUFFICIENCY. A conspiracy of attorneys in asserting a fictitious claim for damages from slander is not established by evidence of unethical conduct between the attorney and his client and in disclosing to plaintiff the contents of a letter inviting participation in a suit for slander, inducing the settlement, where the cause of action existed and the attorney did nothing that any attorney might not properly do in the interests of his client (CHADWICK, J., dissenting).

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered May 25, 1914, dismissing an action in tort, after a trial on the merits to the court. Affirmed.

McAulay & Meigs and *Henry J. Snively*, for appellant.

George B. Holden, for respondent Rankin.

Wende & Taylor, for respondents Gordon *et al.*

MORRIS, C. J.—Appellant sought in this action to establish a conspiracy between respondents, who are attorneys at law, to defraud appellant by asserting against him a fictitious claim for damages growing out of certain slanderous statements said to have been made by appellant, and inducing him to compromise a contemplated action by paying $1,200. The issues being made up, the cause was first submitted to a jury, which disagreed. Subsequently, under stipulation, the

[1]Reported in 156 Pac. 564.

cause was submitted to the court, resulting in judgment of dismissal, from which appeal is taken.

The facts need not be specifically referred to, since we base no affirmative holding upon them. Rankin resided at North Yakima, the other parties at Zillah. Complaint was made to Rankin by a clergyman of Zillah of certain alleged slanderous statements made by appellant. Rankin wrote Gordon inviting him to assist in the contemplated action. Upon receipt of this letter, Gordon called on Monroe, informed him of the receipt and contents of the letter, and urged him to seek a settlement rather than litigate the matter. The amount for which a settlement could probably be procured was discussed, and it was finally determined to acceed to Gordon's advice. On the next day, Monroe, his wife, and Gordon went to North Yakima, Monroe taking with him two certificates of deposit of $500 each. Arriving at North Yakima, Gordon sought out Rankin, and together they proceeded to a hotel where Monroe and his wife were stopping and entered into negotiations for settlement. The result of these negotiations was a stipulation signed by the Monroes and the party alleged to have been slandered, satisfying all differences between them, whereupon Monroe delivered to Gordon the two certificates of $500 each, properly indorsed, together with a check for $195. The certificates were subsequently handed to Rankin.

There is no proof of any conspiracy between these attorneys to defraud appellant by asserting a ficticious claim against him for the purpose of obtaining money. The cause of action existed and Rankin had been regularly retained to prosecute it. There was nothing improper in Rankin securing the assistance of Gordon in the action he contemplated bringing. Nor can it be said that efforts to compromise impending litigation evidences conspiracy between the attorneys representing the respective parties. There is evidence of unethical conduct in the contract between Rankin and his client, and in the act of Gordon in disclosing the contents of

Rankin's letter to Monroe. If Gordon did not care to associate himself in the action, as requested in Rankin's letter, he should have so informed Rankin and let appellant take the initial step in securing his assistance to obtain a settlement. Unethical conduct on the part of these attorneys, however, is not a subject of inquiry in this action. We apprehend, after reading the record, that appellant's own consciousness was as great a factor moving him to the settlement agreed upon as anything that might have been said by either of the attorneys. So far as Rankin is concerned, we find nothing said or done by him in the negotiations for the settlement that any attorney might not properly do in the interests of his client. It is not necessary to produce direct and positive proof to establish a cause of action based upon fraud, circumstances being sufficient when they lead to the natural and irresistible evidence of fraud. But such circumstances cannot arise from strained inference and conjecture. *Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 288, 47 Pac. 738.

The judgment is affirmed.

MOUNT, FULLERTON, and ELLIS, JJ., concur.

CHADWICK, J. (dissenting)—The defendants have been admitted to the bar. It may be admitted that Rankin was regularly retained to bring an action against the Monroes. His contract was to take eighty per cent of all moneys collected from the Monroes, together with a ten-dollar retainer fee in full satisfaction for his services. He was "thrifty." He wrote a letter to Gordon, inviting him to assist with the case, "in as much as you are living there and could doubtless see all the witnesses."

Gordon posed as the friend and adviser of the Monroes. After calling their attention to the threatened suit, and "throwing a scare" into them, he induced them to go to North Yakima with him to see Rankin and seek a compromise. They remained in their room at the hotel until he could go out and get Rankin, who came to the hotel. After some ne-

gotiations, they paid Rankin and, unbeknown to themselves, Gordon, the money they now seek to recover. They did not know of Gordon's secret compact with Rankin, or that he would be a party to the division of eighty per cent of the money Gordon advised them to pay in satisfaction of the claim presented by his confederate.

It seems to me that the court has lost sight of the real issue and held that, since the Monroes may have indeed been guilty of a slander against the "clergyman," they have only paid out what they *might* have paid at the end of a lawsuit, and they should not now complain. They say:

"We apprehend, after reading the record, that appellant's own consciousness was as great a factor moving him to the settlement agreed upon as anything that might have been said by either of the attorneys."

Such considerations have no place here. The only question is: Were the Monroes induced by the fraudulent manipulations of Gordon and Rankin to part with their money? It may be that, had some disinterested and loyal attorney advised them, instead of an adversary party who hoped to divide eighty per cent of $5,000 or $10,000 with a confederate, they would have paid less than they did and possibly nothing at all. They may have had a defense in law.

We can safely leave the merits to the Monroes and the "clergyman," who asked for nothing more than an "apology." It requires no straining of inference or conjecture to hold to the fact, established by an overwhelming weight of the testimony, that defendants in this case are guilty of a deliberate wrong, dishonorable to themselves and discreditable to the profession.

[No. 13036. Department Two. April 11, 1916.]

THE STATE OF WASHINGTON, *on the Relation of A. George Wehe et al., Respondents*, v. PASCO RECLAMATION COMPANY *et al., Appellants.*[1]

WATERS AND WATER COURSES—WATERWORKS — CITY CONTRACT FOR SERVICE—CONSTRUCTION—REMEDIES OF COMPANY. In view of Rem. & Bal. Code, § 7687, requiring all demands against a city to be presented and audited and paid by warrants upon the treasurer, an agreement by a city to pay a water company an annual charge of $900, to be paid by means of rentals duly charged and collected against the property, contemplates payment of warrants from a fund agreed to be collected by the city, making them the equivalent of cash; and failure to make the collections would be a breach of the city's contract.

SAME. Where a contract for water service required payment by the city of an annual charge, to be paid by means of rentals duly charged and collected against the property, and provided that, in case of default in payment or nonperformance by the city, the company might, at its option, shut off the water and discontinue service, the company's right to shut off the water is not affected by the fact that it has a remedy at law against the city by enforcement of the lien of the assessment against the property.

SAME. Neither is the right to shut off water affected by the fact that property owners paying the assessments would be injured thereby, as they may compel the city to proceed against defaulting owners.

Appeal from a judgment of the superior court for Franklin county, Mills, J., entered June 23, 1915, in favor of the relator in mandamus proceedings to compel the furnishing of water, after a trial to the court. Reversed.

Richards & Fontaine and *Driscoll & Leonard*, for appellants.

Edward A. Davis, for respondents.

HOLCOMB, J.—On June 3, 1913, the city of Pasco passed an ordinance authorizing the city to purchase a water supply

[1]Reported in 156 Pac. 834.

for local improvement district No. 44, which had theretofore been created in the city. By the terms of the ordinance, the city was empowered to purchase the water supply for the sum of $15,000, together with an additional maintenance charge of $900 for the first five years, and thereafter an annual charge of $750, which was payable on or before April 1 of each year, commencing with 1914. Pursuant to the terms of this ordinance, the city entered into a contract with the appellant Pasco Reclamation Company. The terms and conditions of this contract material in disposing of this case are as follows:

"Par. 2. The water right hereby conveyed shall be subject to an annual maintenance charge of nine hundred dollars ($900.00) during the years 1914 to 1918, both years inclusive, and thereafter to an annual maintenance charge of seven hundred and fifty dollars ($750.00)."

"Par. 5. The city shall cause the annual charges mentioned in paragraph 2 hereof to be paid to the company at the time and in the manner therein agreed by means of rentals duly charged and collected as provided by law against the property within said improvement district."

"Par. 11. If the annual maintenance charge provided for in paragraph 2 hereof be not paid within the time and in the manner therein specified, or if the city shall fail to perform any other covenant or agreement herein contained by it to be performed, then the company may, at its option, shut off the water from said improvement district and thereafter decline to turn on or deliver said water to said improvement district until such charges are fully paid and until such covenants and agreements are fully performed . . . ."

The ordinance providing for the collection of the maintenance fees is not in any way brought before us.

In April, 1915, which was the second year of the life of the contract, warrants to the amount of $900 were issued by the city to appellant company for the maintenance charge. Appellant company presented these warrants for payment, but payment was refused on account of lack of funds. The evidence tends to show that the levy in 1914 was $929.74; that

warrants to the amount of $964.89 were issued that year, and that $629.36 was collected on this levy. In 1915, the levy was $939.91; $900 worth of warrants were issued, and $605.46 of the levy of this year collected, leaving a balance in the hands of the treasurer greatly insufficient to cash the warrants for $900, tendered to appellant in payment of the maintenance fee. Appellant then returned the warrants to the city and refused to deliver the water as provided for in the contract. Relators, who were property owners, thereupon made an application for a writ of mandamus to compel appellants to furnish them with the water supply. Upon the hearing of this application, the trial court issued the writ as prayed for, this appeal resulting. Several errors are assigned by appellants; but, as we are of the opinion that this case should be reversed on the merits, they will not all be considered.

The determinative features of this case are solely of law, viz., Was the tender of warrants to appellant, without sufficient funds collected for their payment, a sufficient compliance by the city with that part of the contract which provides that $900 maintenance fee shall be paid to appellant annually; and did the city agree, by virtue of paragraph 5 of the contract, to collect the money so that sufficient money would be on hand to pay the maintenance fee?

While it is true that the terms of the contract provide for dollars in payment of the maintenance fee, which in its ordinary interpretation means cash, it seems evident that the parties contemplated that this fee should be paid in warrants, especially in view of that provision of the contract which provides that this annual maintenance charge should be paid by means of rentals duly charged and collected as provided by law against the property in the improvement district. There is no authority under the statutes which will allow the city to disburse this money to appellant in cash.

Rem. & Bal. Code, § 7687 (P. C. 77 § 331), provides as follows:

"All demands against such city shall be presented to and audited by the city council, in accordance with such regulations as they may by ordinance prescribe; and upon the allowance of any such demand, the mayor shall draw a warrant upon the treasurer for the same, which warrant shall be countersigned by the clerk, and shall specify for what purpose the same is drawn, and out of what fund it is to be paid."

It is reasonable to presume that the parties contracted with reference to the law as it then existed, and when considered in connection with paragraph 5 of the contract, we think it is conclusive that the parties contemplated warrants as the mode of payment, since warrants, in so far as the need of appellant is concerned, are the equivalent of cash if there are sufficient funds collected or forthcoming and available, within a reasonably definite time, for their payment. Also the fact that appellant accepted the warrants for the 1914 maintenance fee and, so far as the record discloses, made no objection at that time, since they were cashed, and the further fact that no objection was made to the warrants in 1915 till they were registered unpaid for lack of funds, lends force to this contention.

We do not think that this rule of construction could be extended to such an extent as to hold that $900 means warrants of that amount without sufficient money on hand or forthcoming with reasonable certainty to cash them, and from the fact that some of the 1914 assessment was uncollected at the time of trial it would seem that the city was rather dilatory and negligent in attending to this duty. The unpaid maintenance fees may never be collected or even attempted to be collected by the city.

A warrant of a municipal corporation is a general order payable when the funds are found. *Shelley v. St. Charles County Court*, 21 Fed. 699. It is in effect, in this state, an assignment *seriatim* of that amount of the funds against which it is drawn. A warrant even lacks the stable quality of a definite time of payment peculiar to a bond or note, and

will only be paid when there is sufficient money in that particular fund on which it is drawn to cash it, and judging from the manner in which the city has collected the assessments already levied, this time would be very vague and indefinite.

Under the construction we place upon the contract, the city agreed to pay appellant, on April 1, of each year, $900 in warrants, and also agreed to collect this amount by means of assessments, and to do this in such a manner that the warrants would be equivalent to cash, as they would have been if there were sufficient money on hand or forthcoming to cash them at the time they were tendered to appellant. It is undisputed that there was not sufficient money in that particular fund upon which these warrants were drawn to cash them, and the city therefore breached its contract. It does not seem probable that the parties to the contract contemplated that the appellant should be paid in warrants that would only be the equivalent of money at any future time, dependent on the contingency of the city collecting the delinquent taxes, especially where, by the express terms of the contract, money was made the medium of payment.

In *In re Smith's Petition*, 9 Wash. 85, 37 Pac. 311, 494, this court held in eminent domain proceedings that just compensation would be made within the meaning of the constitution by the issuance of a warrant in the ordinary way, if there were funds in the treasury out of which it could be paid on presentation. In *Van de Vanter v. Redelsheimer*, 58 Wash. 38, 107 Pac. 847, this court held that payment must be made in money unless a different medium of value or exchange is expressed. This contract provided that money was the medium of payment, and we have construed this to mean money or its equivalent, which would be warrants that were capable of being converted into cash on the day of payment—as favorable a construction under the terms of this contract as relators could contend for.

Relators urge that, if the taxes for the maintenance fee were not properly collected, appellant had its remedy at law against the city, as the assessment was a valid lien against the property. Granting that this is true, by the express terms of the contract, an additional remedy was provided upon the breach of any covenant on the part of the city, viz., the turning off of the water, which remedy appellant resorted to in this case. The express terms of a contract cannot be avoided simply because another remedy at law is available.

If a few of the beneficiaries of the contract can enforce the furnishing to them upon their compliance, others failing to comply, the result would be that the nonperforming property owner would derive as much benefit from nonperformance as from complete performance.

The contract for the use of the water was a semi-public one, made for the benefit of all the real property owners in a certain defined and established local improvement district. It certainly appears that a manifest hardship and injustice will be worked upon the property owners residing within the improvement district who punctually pay their annual assessments, by the default of those who fail to pay. In such case, however, it is the duty of the city, as the agent and manager of the improvement district, to collect the funds from defaulting owners in the manner provided by law. If the city fails in its duty, it would seem that the remedy of the injured property owners would be, in the first instance at least, to proceed against the city to compel it to perform its duty in the premises. The service company, having a like interest, might also proceed against the city to compel it to proceed to enforce payment of the assessments, but it has a choice of remedies, the latter or the remedy of ceasing to supply the water.

We are of the opinion that the judgment must be reversed and the action dismissed, and it is so ordered.

MORRIS, C. J., MAIN, and PARKER, JJ., concur.

[No. 13055. Department Two. April 11, 1916.]

CITIZENS BANK & TRUST COMPANY, *Respondent*, v. N. RUDEBECK, *Appellant*.[1]

PLEDGES—DUTY OF PLEDGEE—CONSERVATION OF PLEDGE—OPTIONAL CONTRACTS. A pledgee holding as collateral a contract for the purchase of the controlling interest in a railway is not guilty of a breach of duty in failing to conserve the collateral pledged by inforcing the contract, where it appears that the contract was purely optional in form and unenforcible except by forfeiture of payments made, the pledgee made no change in its terms, the assignee elected to abandon and forfeit the same and gave notice to that effect, and forclosure of the pledge was thereupon commenced within three months, which conserved the rights of the pledgor as well as a more prompt foreclosure would have done.

EVIDENCE—CONCLUSION OF WITNESS. A question as to whether a change was made in a contract while the witness was in the east and without his knowledge, is objectionable as calling for the conclusion of the witness as to a fact occurring in his absence.

PLEDGES—DUTY OF PLEDGEE—DEPRECIATION—LIABILITY. A pledgee of an optional contract for the purchase of a controlling interest in a railway is not liable for the depreciation in the value of the pledge by reason of the abandonment of the contract and the building of a railway of its own by the holder of the option.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered December 30, 1914, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Howard Hathaway and *Eugene H. Beebe*, for appellant.

Sherwood & Mansfield, for respondent.

PARKER, J.—The plaintiff bank seeks recovery upon a promissory note, executed and delivered to it by the defendant, and also the foreclosure and sale of collateral which was assigned to it by defendant as security for the payment of the debt evidenced by the note. Trial in the superior court

[1]Reported in 156 Pac. 831.

resulted in findings and judgment in favor of the plaintiff, from which the defendant has appealed.

The claimed error particularly relied upon by counsel for appellant, and upon which is rested his claimed right to a new trial, is the exclusion by the court of certain testimony sought to be introduced in his behalf. In order to render plain our views upon this question, it seems necessary for us to notice somewhat fully the merits of the case touching appellant's affirmative defense; which is, in substance, that "the careless and dilatory tactics" of the respondent in dealing with the collateral security resulted in damage to appellant, in that thereby the value thereof became lost to him.

In September, 1908, a contract was entered into between the Puget Sound, Skykomish & Eastern Railway Company, the appellant, who was then the owner of substantially all its capital stock, and H. W. Hawks, for the sale to Hawks of all of the capital stock of that company, excepting fifty shares thereof, and in effect transferring to Hawks the control of that company and its property. By the terms of this contract, the purchase price to be paid to appellant was $15,000, payable in installments during the ensuing five years. This contract was, in effect, an option in favor of Hawks for the purpose contemplated, and expressly exempted Hawks from personal liability for the purchase price "except to the extent of the money which he has paid or will hereafter pay under the terms of this option." The only remedy available to appellant upon the failure of Hawks to make the payments contemplated was that of forfeiture of his right to complete the purchase. Two hundred and fifty dollars was paid by Hawks in pursuance of the terms of this contract at the time of its execution. Prior to July, 1913, Hawks sold and assigned to the Index-Galena Company his interest in this optional purchase contract with the view of that company's becoming the owner of the stock and a controlling interest in the railway upon completion of the purchase by it. There was no evidence introduced or offered upon the trial showing that

the Index-Galena Company assumed any personal liability whatever to pay the purchase price. By the assignment, it simply stood in the shoes of Hawks and was as free to abandon its right of purchase and thereby forfeit whatever sums may have been paid upon the contract as was Hawks before the assignment.

In July, 1913, appellant executed and delivered to respondent his promissory note, evidencing a debt then owing from him to it, and at the same time assigned his interest in the optional contract and all sums to be thereafter paid thereon, and also his certificate evidencing his ownership of the capital stock of the company, all as security for the payment of his note then given to respondent. Thereafter, in April, 1914, there remaining the sum of $2,025, due upon the note, he renewed the same by giving to respondent a new note for that sum, the assignment of the collateral made to it by appellant being retained by respondent as security for this new note. This new note matured on July 4, 1914, and remaining unpaid, this action was commenced in October, 1914, to recover thereon and to foreclose and sell the collateral pledged as security therefor.

While this collateral was in the hands of respondent, evidently before the giving of the renewal note, respondent was informed by the Index-Galena Company, the then holder of the optional sale contract, in substance, that it elected to forfeit the amount paid upon the contract and abandon its right to complete the purchase. This election was evidently made because that company concluded it could better afford to build a new railway for its purposes than to pay the balance of the purchase price under this contract and thereby obtain control of this railway. The Index-Galena Company thereafter, by consent of all parties, used the railway for a time in its logging operations, for which use it paid to respondent a monthly rental which, as received by respondent, was credited upon the debt due to it from appellant. This use, however, was discontinued upon objection thereto being made by

appellant. While so using the railway, the Index-Galena Company constructed a railway of its own, which, by reason of its competing location, rendered, as claimed by appellant, the railway here involved of little or no value.

Counsel for appellant invoke what they conceive to be the general rule:

"That the pledgee of collateral has a duty devolving upon him to conserve collateral pledged, to collect the same, and apply the proceeds to the discharge of the obligation;"

citing *Scott v. First Nat. Bank*, 5 Ind. Terr. 292, 82 S. W. 751, 68 L. R. A. 488, a decision wherein the subject is reviewed at some length as applied to collateral security the value of which may become lost by the negligence of the holder thereof.

It seems to us, however, that, whatever may be the duty of the holder of property for the security of a debt owing to him to render such security effective and see that its value is not lost to the debtor, it is plain that no such duty has been violated by this respondent. Counsel for appellant seem to proceed upon the theory that respondent did not use due diligence in enforcing payment upon the installments to be made upon the optional sale contract, and in allowing the Index-Galena Company to abandon the purchase contemplated by that contract. Counsel seem to lose sight of the fact that that was not an enforcible contract against either Hawks or his assignee, the Index-Galena Company; but was, in effect, a mere option under which the purchase could be completed or not, as Hawks or the Index-Galena Company, his assignee, might elect. Manifestly, the respondent had no power whatever to enforce payment of any part of the purchase price, having only the power to cause forfeiture of the prospective purchaser's rights thereunder, which forfeiture, as we have seen, was brought about by the election of the Index-Galena Company, Hawks' assignee. It seems quite plain to us that the evidence leads to no other possible conclusion than that re-

spondent violated no duty whatever in so far as conserving the collateral security is concerned.

The only offer of proof referred to in the brief of counsel for appellant, claimed to have been erroneously excluded, is that shown by the three following questions asked appellant as a witness, which, upon objection of counsel for respondent, were by the court ruled out.

"Q. Did the bank change this contract with the Index-Galena people that you had with them upon this security in your absence and while you were east and without knowledge or not? Q. Have you been able to lease or sell your railroad since they built theirs? Q. Is your railroad now operated by anybody?"

The first of these questions, upon its face, calls for the witnesses' conclusion as to a fact occurring in his absence, and for that reason calls for hearsay evidence, rather than for a statement of a fact within his own knowledge. This is rendered even more apparent when other facts shown by the record are considered. Remarks made by the trial judge during the progress of the trial render it plain that the court was very careful not to exclude any competent or relevant proof tending to show that there had been any change voluntarily made by respondent in the optional sale contract which would work to the detriment of appellant, the judge going so far as to suggest to counsel for appellant that he would hear any competent evidence as to any such change, and also as to any change in the contract that could be construed as rendering the Index-Galena Company personally liable for the purchase price, such as would have enabled respondent to enforce the contract as one binding the purchaser to complete the purchase, instead of as a mere option furnishing no remedy other than that of forfeiture.

The second and third questions go only to the depreciation of the value of the railway, which, from other facts we have noticed, was probably because of the building of the new railway by the Index-Galena Company. Admitting all this

to be true—and the answers to these questions would prove nothing more—it seems plain to us that respondent could not be held liable for such depreciation in the value of the railway while the collateral was in its hands. Respondent could not prevent the Index-Galena Company from abandoning its option to purchase the railway, nor could respondent prevent that company building a railway of its own; nor is there any evidence showing that a more prompt foreclosure would have any better protected appellant's interests. For that matter, the foreclosure was fairly prompt, being commenced within about three months after the maturity of the note sued upon.

We note here the fact that the wife of appellant Rudebeck was also defendant and appellant in the case. We have referred to Rudebeck as appellant simply for convenience of expression.

We are of the opinion that appellant has had a fair trial and that he is not entitled to any damages to offset the amount due upon his note. The judgment is affirmed.

MORRIS, C. J., MAIN, and HOLCOMB, JJ., concur.

[No. 13157. Department Two. April 11, 1916.]

W. W. Hamilton *et al.*, *Appellants*, v. J. E. Vioue *et al.*, *Respondents*.[1]

Highways — Negligent Use — Collision — Automobiles — Joint Owner—Liability. Where one of two partners or joint owners of an automobile was using it on a pleasure trip of his own, and not on behalf of or within the reasonable scope of any partnership business, the other owner is not liable for damages sustained in a collision through the negligent driving of his co-owner.

Same—Statutes. Laws 1915, p. 396, § 33, providing that the owner of an automobile shall be equally liable with an agent or any person employed by him to operate it, does not render a joint owner of an automobile liable for the negligence of his co-owner when driving the car for his own pleasure.

Appeal from a judgment of the superior court for King county, Smith, J., entered June 19, 1915, upon findings in favor of the defendants, in an action for damages sustained in an automobile collision, tried to the court. Affirmed as to one defendant; reversed as to the other.

C. A. Holtz (*Warren H. Lewis*, of counsel), for appellants.
Million & Houser, for respondents.

Morris, C. J.—Appellants jointly owned a Ford automobile, which collided with an Everett car owned by respondents. Action was brought alleging a collision as a result of respondents' negligence. Respondents counterclaimed, alleging appellants' negligence. The cause was tried to the court without a jury, resulting in findings and judgment in respondents' favor againt both appellants.

Two errors are presented by the appeal. First, the correctness of the findings in respondents' favor upon the question of negligence; and second, the entry of judgment against both appellants.

[1]Reported in 156 Pac. 853.

The first question presents a plain question of fact which the lower court has determined against appellants, making findings which are abundantly sustained by the weight of the testimony, and with which we agree. Appellants' main argument here, in seeking to overthrow the findings, is based upon the positions of the two machines in the ditch after the collision. It does not seem to us that the positions of the machines after being hurled from the highway into the ditch by the force of the impact is any proof of the manner in which the accident occurred, or the relative positions of the machines at the time of the collision. The fault of the accident must be determined by what took place prior to, and at the time of the collision, and we are satisfied that the negligent driving of the Ford was the cause of the collision.

The accident occurred on Saturday afternoon while W. W. Hamilton, accompanied by a gentleman and two lady friends, were out on a pleasure ride. Under the circumstances, we can find no legal liability against C. T. Hamilton. The Ford car, at the time of the collision, was neither operated by him, nor by his agent or servant while engaged in any service for him. Neither was it operated as a part of any joint enterprise in which he and his brother were engaged. Even though it should be held that the Hamilton brothers were partners in the ownership of the car (losing sight, for the moment, of the general rule that ownership of property does not of itself create a partnership), no liability will follow to C. T. Hamilton, as the record fails to show that the car, at the time in question, was operated on behalf of, or within the reasonable scope of, any partnership business. W. W. Hamilton was, at the time of the accident, using the automobile for his own personal pleasure and that of his companions. Under such circumstances, there is no rule of law that will fasten liability against C. T. Hamilton. *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 125 Am. St. 915, 14 L. R. A. (N. S.) 216; *Towers v. Errington*, 78 Misc. Rep. 297, 138 N. Y. Supp. 119; *Herlihy v. Smith*, 116 Mass. 265; *Lotz v. Hanlon*, 217 Pa. St.

339, 66 Atl. 525, 118 Am. St. 922, 10 L. R. A. (N. S.) 202; *Slater v. Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 133, 5 L. R. A. (N. S.) 598; *Hayes v. Wilkins* (194 Mass. 223, 80 N. E. 449, 120 Am. St. 549), 9 L. R. A. (N. S.) 1033, note.

We have a number of cases where a liability has been sustained against a community when the injury was occasioned through the negligence of one of its members, but there is a wide distinction between a community and the joint ownership here shown. In a community, there is but a single or sole ownership. Here there is a double or joint ownership. Even in cases where the community is held liable, there must be a showing of agency or service. *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 135 Pac. 821, 50 L. R. A. (N. S.) 59.

No authorities are presented by respondents under which liability can be sustained against C. T. Hamilton. The only argument in support of liability in respondents' brief is this:

"In our opinion, it is unnecessary to quote any authorities on the question of one joint owner of an automobile being liable in damages for the negligence of his co-owner in the operation of the machine. Section 33, of chapter 142, Laws of 1915, which recites such liability of a joint owner, is in our opinion a legislative declaration of what has always been the law."

The contention that joint ownership of itself establishes joint liability for negligence is unsound. Neither is there anything in the Laws of 1915, p. 385, ch. 142, p. 396, § 33, that would establish such a rule. Because of the lack of pertinent facts, the section referred to has no application here.

The judgment is sustained as to W. W. Hamilton, and reversed as to C. T. Hamilton.

Parker, Main, Bausman, and Holcomb, JJ., concur.

[No. 13181. Department Two. April 11, 1916.]

In the Matter of the ESTATE OF JOSEPH TACHI.

ANTONIA TACHI, *Appellant*, v. JOHN P. KENT, *as Administrator, Respondent.*[1]

EXECUTORS AND ADMINISTRATORS—COMPENSATION—CONTRACTS—FINAL ACCOUNT—MATTERS CONSIDERED. An agreement by the widow and sole heir that she waive her right to administration and that the deceased partner in certain real estate act as administrator and receive one-half of the commissions allowed by law upon other than partnership property, should be enforced in the probate proceedings on the final accounting.

APPEAL—DECISION—COSTS. An appellant who recovers a more favorable judgment on appeal is entitled to costs on appeal.

Appeal from a judgment of the superior court for Walla Walla county, McCroskey, J., entered June 7, 1915, allowing an administrator's final account, on objections by the sole heir. Modified.

John C. Hurspool, for appellant.

F. A. Garrecht and *Evans & Watson*, for respondent.

HOLCOMB, J.—Joseph Tachi died intestate on August 8, 1912, leaving surviving him his widow Antonia Tachi, but no children. All the property left by the deceased was community property, so that Mrs. Tachi was the sole heir. The deceased and John P. Kent owned certain real estate together. Immediately after the death of Tachi, Mr. Kent went to the home of his widow and there insisted on his appointment as administrator of the estate. Mrs. Tachi's consent was obtained, she signed a petition asking for Mr. Kent's appointment, and in due course he was appointed. Some days after the signing of the petition by Mrs. Tachi, she went to the office of Kent's attorneys, where a contract was prepared which she signed by making her mark, she being unable to

[1]Reported in 156 Pac. 833.

read or write any language. Mr. Kent proceeded with the administration of the estate and, about two years and three months after his appointment, he filed his final account, charging the estate with commissions as administrator upon community property of deceased to the amount of $169,026.80, the commissions aggregating $6,801.07. Upon the filing of the final account, Mrs. Tachi filed her objections to the allowance of the account as to this commission on the ground that her consent was obtained by undue influence and the claim that Mr. Kent represented that he had a prior right because of his alleged partnership with Mr. Tachi. She also objected to the allowance of the full amount of the commission, claiming that she was entitled to one-half thereof under the agreement made with Mr. Kent in regard thereto. The agreement is set up in an affidavit made by the administrator in response to the objections to the final account made by Mrs. Tachi, and recites, among other things, that:

"Mrs. Tachi has heretofore petitioned the superior court to have John P. Kent appointed administrator of the estate of the said Joseph Tachi, deceased, and it being agreeable to said parties owning property in partnership with the said Joseph Tachi at the time of his death that all of the different properties be included and administered upon at the same time.

"Now for the purpose of carrying into effect said arrangement agreeably to those concerned, it is understood and agreed between the said John P. Kent and Antonia Tachi that the said Kent is to have the administration of all of said property community and partnership; that the said Antonia Tachi is to have, collect, receive and account for the rents from the garden lands belonging to said Joseph Tachi and the houses rented belonging to said Joseph Tachi at the time of his death, and as compensation therefor said Antonia Tachi is to receive one-half of the commission as provided by law, and which would be due and payable upon the community property of the said Joseph Tachi only, as distinguished from the other property in which the said Joseph Tachi had a partnership interest at the time of his death."

Upon a hearing of the objections by the court, Mrs. Tachi testified that, at the time of the conferences between herself and Mr. Kent, he repeatedly offered that, if she would let him administer the estate, he would give her one-half of the commission; that he would do the work and give her half of the commission. There was other testimony to the same effect, and it must be considered that Mrs. Tachi, having waived her right to administer upon the estate in favor of Mr. Kent, did so, at least partially, upon the understanding and agreement that Mr. Kent would allow her one-half the commissions allowable to the administrator. This is further confirmed by the agreement in question, although it limits the matter of the commission to the community property of deceased as distinguished from the property in which deceased at the time of his death had a partnership interest with Mr. Kent. There is no showing of any undue influence or any improper conduct in the administration of the estate on the part of the administrator; and, in fact, those contentions seem to have been abandoned.

The court took the view that the matter of the division of commission between Mrs. Tachi and Mr. Kent was a purely personal agreement between them, not connected with the estate and in no sense a part of the probate of the estate, and that it, therefore, had no jurisdiction to consider the matter upon the hearing. Even were the contract construed to be a separate and distinct agreement apart from the administration of the estate, yet all the parties to it were before the court, the determination thereof would prevent a multiplicity of suits, and there would be no inequity whatever in determining the matter as a part of the administrator's administration of the estate. Under his contract, he is not entitled to more than one-half of the commission designated therein. In view of his agreement to allow Mrs. Tachi the one-half of his commissions in consideration of her waiving her right to administer upon the estate, and she being the sole heir, there

is no reason whatever why it should not be determined in this matter and thus ended. Upon the record before us, we are able to determine what part of the estate was owned in common by Tachi and Kent. The appraised value thereof aggregates the sum of $19,700. Kent is not entitled to consider exempt from the agreement between him and Mrs. Tachi partnership or joint property owned by the deceased and others than himself. The statutory commission upon property owned by respondent and Joseph Tachi of the value of $19,700 amounts to the sum of $828, to which commission the administrator is entitled without division. This leaves commissions in the amount of $5,973.07 upon property administered by him which he is required to divide and allow appellant and deduct from his own commissions the sum of $2,986.54. The judgment is modified accordingly, so as to allow the respondent, as administrator's commissions, the sum of $3,814.53, and distribute to the appellant the sum of $2,986.54 as commissions waived by respondent in her favor. Appellant, having recovered a more favorable judgment in this court, is entitled to her costs of appeal, which should not be paid by the estate but by the respondent, and it is so ordered.

Morris, C. J., Main, and Parker, JJ., concur.

[No. 13250. Department Two. April 11, 1916.]

OWEN JOHNSON *et al.*, *Appellants*, v. JOHANNA MARIANA BLOMDAHL, *Respondent*.[1]

FRAUDULENT CONVEYANCES—WANT OF CONSIDERATION—EVIDENCE—SUFFICIENCY. A conveyance of all the debtor's real property to his sister, upon threat of an action against him for breach of promise, is shown to be fraudulent as to creditors, where it appears that the only consideration was his alleged oral promise to pay his sister $15 a month towards the support of their niece, legally adopted by her upon the death of another sister, that the debtor was a bachelor, making his home with his sister for twenty years except when away at work, and during the thirteen years after the adoption, he had paid his sister no more than fair compensation for his board and lodging, although well able to make payments upon the alleged agreement, upon which payments had never been made; especially where he continued to exercise acts of ownership over the property after the conveyance.

BREACH OF MARRIAGE PROMISE—ACTIONS—ACCRUAL. A promise to marry at a future time is breached immediately upon defendant's informing the plaintiff that he would never marry her.

FRAUDULENT CONVEYANCES—"CREDITORS"—WHO ARE. One having a right of action for breach of marriage promise is a "creditor" from the time the right of action accrues, within the law relating to conveyances in fraud of creditors.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered July 10, 1915, in favor of the defendant, dismissing an action to quiet title, after a trial to the court. Affirmed.

Ellis De Bruler and *W. P. Bell*, for appellants.

Saunders & Nelson, for respondent.

PARKER, J.—The plaintiffs, Johnson and wife, seek a decree quieting title in them to a tract of land in Snohomish county, as against the claim made thereto by the defendant, Johanna Blomdahl, under an execution sale at which she became the purchaser of the land in partial satisfaction of a

[1]Reported in 156 Pac. 561.

judgment rendered in her favor against Frank August Gustafson. Trial in the superior court resulted in a decree in her favor, from which the plaintiffs have appealed to this court. The main question here presented is as to whether appellants acquired their conveyance of the land from Frank August Gustafson in fraud of respondent's rights as a creditor of Gustafson.

The facts, as disclosed by the record before us, we think, may be fairly stated as follows: Sometime in the early part of the year 1913, respondent and Gustafson became engaged to be married, it being agreed between them that their marriage should occur about December of that year. Following their engagement, they indulged in sexual intercourse, resulting in respondent becoming pregnant sometime in the spring of 1913. This condition of respondent becoming apparent to her, she insisted upon an immediate marriage to Gustafson, which he refused to consummate. About August 1, 1913, after several entreaties on her part to have their marriage take place without further delay, he gave her to understand that he would not marry her at all, and in that sense broke his promise, though the time for the marriage as originally agreed upon had not arrived. She then threatened to sue him for breach of promise. Soon thereafter, on August 11, 1913, he conveyed to appellants the land here in controversy, that being all the property he possessed subject to execution. Thereafter respondent sued Gustafson in the superior court for King county for the recovery of damages resulting to her from his breach of promise of marriage, in which action judgment was rendered in her favor against him for the sum of $5,000 on December 8, 1914. Soon thereafter, a transcript of that judgment was duly filed in the office of the clerk of the superior court for Snohomish county. Execution issued thereon and the land here involved was sold thereunder as the land of Gustafson, respondent becoming the purchaser thereof in partial satisfaction of that judgment.

Appellants claim to be the purchasers of the land from Gustafson for value and in good faith before the rendering of the judgment against Gustafson under which respondent purchased the land, and that, therefore, she acquired no interest therein by virtue of her purchase under the execution sale. The consideration for the purchase of the land from Gustafson by appellants is claimed by them to be a debt owing by him to them for the maintenance of a child of a deceased sister of Gustafson and appellant Anna Johnson, adopted by appellants in the year 1895; and also for his board and lodging while living with them.

Gustafson is a bachelor, approaching fifty years of age. He has, for twenty years or more, made his home, in so far as he has had a home, with appellants. Appellant, Anna Johnson, is his sister, and the only relative he has living in this country, save the adopted child, his neice. He has been away to Alaska and other places at work a large portion of the time, but has always regarded his home as being with appellants. In 1895, a sister of Gustafson and appellant Anna Johnson died in California, leaving a daughter, then about one year old. This child was soon thereafter legally adopted by appellants and has ever since been reared and cared for by them as their own child.

It is claimed by appellants and Gustafson, and they so testified, that, at the time of the adoption of this child, it was agreed that, if they adopted and cared for the child, Gustafson would pay to them the sum of $15 per month towards her support. No writing of any kind was ever made evidencing such an agreement, nor was any memorandum in writing ever made evidencing any payments thereof. The alleged agreement and payments thereon as to Gustafson's board and lodging is not evidenced with any greater degree of certainty, so far as any express contract therefor is concerned. According to the testimony of appellants and Gustafson, in the year 1908, thirteen years after the adoption of the child, Gustafson gave to his sister $1,000, and in the year 1910 he

gave to her $250 additional. It is not claimed that any other payments were ever made from Gustafson to appellants or either of them. The total of these payments would not materially exceed a fair compensation for Gustafson's board and lodging, considering the time he spent at the home of appellants and interest for delay in payment therefor. Gustafson was well able to make payments on the alleged agreement to support the child long before the payment of the $1,000.

The evidence, as a whole, seems to warrant the conclusion that it was the intention of Gustafson that his sister should have his property in case of his death. The evidence also, we think, leads to the conclusion that the obligations which Gustafson was under as to the Johnsons were such as are prompted by family relations rather than resting upon any legally enforcible contract relation. The evidence is not very clear in showing that appellants had knowledge of the threatened breach of promise suit by the respondent against Gustafson at the time he conveyed the land to them. We have noticed that this land was all of the property of any consequence owned by Gustafson at the time he conveyed it to appellants. It is also shown that appellants then knew that it was substantially all the property possessed by him. The land is unoccupied in that it can hardly be said to be in the actual physical possession of any one. It is also largely unimproved, though Gustafson has improved it to some extent by ditching and clearing. In this connection, it is worthy of note that some of this improvement appears to have been made by Gustafson after he conveyed the land to appellants, thus pointing to his continued interest in the land.

The learned trial court decided the case in respondent's favor upon the theory that the conveyance from Gustafson to appellants was wholly without consideration; that they became mere volunteers and were not entitled to hold the land as against the lien of the judgment rendered in respondent's favor against Gustafson, though that judgment was render-

ed a considerable time after the conveyance by Gustafson. The trial court also proceeded upon the theory that the obligation or debt upon which the judgment was rendered accrued to respondent prior to the conveyance by Gustafson to appellants. We are constrained to agree with the conclusion reached by the trial court, in view of all the circumstances shown, and especially in view of these salient facts: The conveyance was in effect from Gustafson to his sister, between whom there was a particularly close relationship. The land so conveyed was all of his property subject to execution, which fact was then known to appellants. Gustafson, in some measure at least, continued to exercise acts of possession evidencing his interest in the land after his conveyance thereof to appellants. The alleged agreement for the support of the minor child of the deceased sister was not claimed to have been made other than orally and remained without any recognition by payments thereon for thirteen years. The evidence points quite convincingly to Gustafson's ability to make the agreed payments thereon had there been any such agreement and had he considered himself under obligation to do so. The conclusion is warranted that there was no agreement that became binding in law upon Gustafson to make payments toward the support of the deceased sister's child, and that whatever legal obligation rested upon Gustafson for his board and lodging was satisfied by the payments we have noticed. Whatever obligation Gustafson may have considered resting upon him to contribute toward the support of the deceased sister's child, we think was prompted by family ties and was not such as could be enforced in law. We agree with the trial court in the view that the conveyance made by Gustafson to appellants was wholly without legal consideration, and was in fraud of the rights of respondent. The following decisions of this court lend support to our conclusion here reached: *Keith v. Kreidel*, 4 Wash. 544, 30 Pac. 638, 31 Pac. 333; *Bates v. Drake*, 28 Wash. 447, 68 Pac. 961; *Adams v. Dempsey*, 35 Wash. 80, 76 Pac. 538; *Canedy v. Skinner*, 50 Wash. 501,

97 Pac. 497; *Kalinowski v. McNeny*, 68 Wash. 681, 123 Pac. 1074.

Some contention is made in appellants' behalf that whatever right of action respondent had against Gustafson for breach of promise had not accrued at the time of the conveyance of the land by Gustafson to appellants on August 11, 1913. This seems to be rested upon the theory that it is so because the time for fulfilling the agreement for marriage would not arrive until the December following. This contention, we think, finds its answer in the fact that Gustafson not only had fully made up his mind to breach his promise of marriage prior to the making of the conveyance of his land to appellants, but he then informed respondent that he never would marry her. Under such circumstances, we think her right of action accrued immediately. This court has held that the term "creditor" not only includes the holder of a certain and fixed present debt, but every one having a right to damages capable of judicial enforcement, whether growing out of tort or contract. Plainly, under the facts of this case, respondent was a creditor of Gustafson prior to the time he conveyed this land to his sister and brother-in-law without consideration. *Bates v. Drake*, 28 Wash. 447, 68 Pac. 961; *Sallaske v. Fletcher*, 73 Wash. 593, 132 Pac. 648, Ann Cas. 1914 D. 760, 47 L. R. A. (N. S.) 320; *Allen v. Kane*, 79 Wash. 248, 140 Pac. 534.

We conclude that the judgment must be affirmed. It is so ordered.

MORRIS, C. J., HOLCOMB, and MAIN, JJ., concur.

[No. 12871. Department One. April 12, 1916.]

MATT JOHNSON, *Respondent*, v. FRANKLIN INSURANCE COMPANY, OF PHILADELPHIA, PENNSYLVANIA, *Appellant*.[1]

INSURANCE—POLICY—REMOVAL OF GOODS—FORFEITURE. A stipulation in a policy of fire insurance that the goods are insured only while at the designated location and that the policy shall be void if the property is removed without the company's consent, is of the essence of the contract, and the policy is annulled where the insured removed the goods without permission.

SAME. Such clause is not merely a warranty or condition, under 3 Rem. & Bal. Code, § 6059-34, providing that breach of a warranty or condition shall not avoid the policy unless such breach contributes to the loss.

SAME—POLICY—FORFEITURE—ESTOPPEL. Where an insured made request of an insurance agent for consent to the removal of goods, insured at a particular place, to a new location, as required by the policy, and removed the same on the next day without waiting for permission, the failure of the company to object does not work an estoppel to avoid the policy.

Appeal from a judgment of the superior court for King county, Frater, J., entered March 10, 1915, in favor of the plaintiff, by direction of the court, in an action upon an insurance policy, after a trial before the court and a jury. Reversed.

Ballinger & Hutson, for appellant.

Shepard, Burkheimer & Burkheimer, for respondent.

FULLERTON, J.—On April 12, 1912, the respondent, being then the owner of certain household goods, insured the same with the appellant company in the sum of $900. The policy issued was in form a New York standard policy, and purported to insure the goods for a term of three years, "all while contained in the frame building while occupied only as a dwelling, known as dwelling No. 30, at Franklin, King coun-

[1]Reported in 156 Pac. 567.

ty, Washington." The policy recited that it was made and accepted subject to certain conditions printed on the back thereof, among which was the condition that no privilege or permission affecting the insurance under the policy shall exist or be claimed by the insured unless written or attached thereto. The policy was issued and countersigned by the Sylvester Insurance Agency, a concern of which one W. C. Sylvester seems to have been the sole proprietor. Sometime after the issuance of the policy, the Sylvester Insurance Agency gave written consent in the name of the company to the removal of the property to a place designated as No. 409, Fifth avenue, Seattle, Washington. Subsequent to the issuance of this permit, the agency ceased to represent the company, due notice of the change being filed in the office of the state insurance commissioner on November 13, 1913. On April 5, 1914, the respondent addressed a letter to the Sylvester Agency asking for a permit to remove the goods to No. 2832, Portland street, in the city of Seattle. Some nine days later, he wrote that he had misnamed the street to which he desired to remove, and that the correct name was Holden street. No reply was made by the Sylvester agency to either of these letters, nor does it appear that they were forwarded to the insurance company. On April 24, 1914, ten days after the last of the letters mentioned was written, the property was destroyed by fire at No. 2832, Holden street, in the city of Seattle; the respondent having removed the goods to that place on April 6, 1914, the day following the writing of the first letter. After the fire, the respondent notified the Sylvester agency of the fact, who in turn forwarded to the insurance company a copy of the notice, together with copies of the letters previously written by the respondent relating to the removal permit, which was the first notice the company had of any of the matters. Due proofs of loss were made by the insured and payment demanded of the company. Payment was refused, and this action was instituted upon the policy. At the trial, which was had before the court sitting with a jury, the re-

spondent, at the conclusion of the evidence, moved for judgment in his favor. This motion the trial court granted, discharging the jury and entering judgment in favor of the insured for the amount named in the policy. From this judgment, the insurance company appeals.

But two questions are suggested by the record; first, did the policy as written cover the property at the place to which it was removed; and, second, is the insurance company estopped by its acts from asserting that it did not cover them.

The first question, we think, must be answered in the negative. An insurance company has the right to determine for itself what property it will insure and at what place it will insure it, and to provide that the policy shall become void if the property is removed from the designated place without its consent. This policy provides, in unmistakable terms, that the property described thereon is insured only while at the designated location, unless otherwise provided by agreement indorsed thereon; and, clearly, such a condition is of the essence of the contract and the court cannot hold that it covers the property elsewhere without making a new contract for the parties. Such is the effect of our holdings in the cases of *Henschel v. Oregon Fire & Marine Ins. Co.*, 4 Wash. 476, 30 Pac. 735, 31 Pac. 332, 765; *Jump v. North British & Mercantile Ins. Co.*, 44 Wash. 596, 87 Pac. 928, and *Ferguson v. Lumbermen's Ins. Co.*, 45 Wash. 209, 88 Pac. 128. And such, also, as we understand it, is the general rule. See, Clement, Fire Insurance, p. 57, and cases there collected; also, note to case of *Benton v. Farmers' Mut. Fire Ins. Co.*, 26 L. R. A. 237.

Our attention is called to § 34 of the Insurance Code (Laws of 1911, p. 197, § 34, 3 Rem. & Bal. Code, § 6059-34), as modifying the general rule above stated. This section reads as follows:

"No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the

assured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent it attaching, unless such misrepresentation or warranty is made with the intent to deceive. The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss; anything in the policy or contract of insurance to the contrary notwithstanding. In case a loss occurs while a breach of warranty exists, if it contribute to the loss, the insured shall only be entitled to recover the amount of insurance the premium paid would purchase at the rate that would be charged without the warranty. This section shall be liberally construed."

The argument is that the clause of the contract relating to the place in which the goods are insured is a warranty or condition, and that, in virtue of this provision of the statute, the removal of the goods to another locality will not avoid liability unless such removal contributes to the loss. But, without following the argument of counsel, we think it neither a warranty nor a condition as the terms are here used. A condition, according to the definition of Mr. Black, is "an agreement or stipulation in regard to some uncertain future event, not of the essential nature of the transaction, but annexed to it by the parties providing for a change or modification of their legal relations on its occurrence;" while a warranty, according to the same authority, is "An undertaking or stipulation, in writing, or verbally, that a certain fact in relation to the subject of a contract is or shall be as it is stated or promised to be." The clause of the contract in question is neither of these. On the contrary, it is an essential part of the contract, as much so as is any other part of the promise to insure. The contract is that the insurer shall be liable for their loss by fire while they remain at the particular building, not while away from it. It is a simple contract to insure while the property is at a particular place. No conditions or warranties, such as the statute contemplates, are involved.

The second contention, that there was an estoppel, is equally without merit. The insured cannot compel assent on the part of the insurer to a change in the locality of the property insured. It is, in effect, the making of a new contract, and the insurer may assent or refuse as he chooses. While it may be that circumstances can arise where assent would be implied, this is not such a case. The only evidence of an implied assent is the fact that no objection was made to the removal. But the notice was given on one day and removal made on the next. Had the notice been addressed to the company's duly authorized agent, and had it been shown that the notice was received by him on the day of its mailing, there would be no obligation on the company's part to make known its refusal to extend the insurance to the new locality within so short a time.

The judgment should have been in favor of the defendant below, not the plaintiff. The judgment is therefore reversed and the cause remanded with instructions to enter a judgment for the defendant.

MORRIS, C. J., MOUNT, ELLIS, and CHADWICK, JJ., concur.

[No. 12898. Department One. April 12, 1916.]

STATE BANK OF SEATTLE, *Respondent*, v. JOHN RUTHE *et al.*, *Appellants*.[1]

ANIMALS—HIRE—LIABILITY—DUTY TO KEEP ACCOUNT. It is the duty of one hiring teams on grading work to keep the account of the number of days they actually worked, if he would limit the liability to that extent, and failing to keep such account, he would be liable for the entire period that they were in his possession.

PRINCIPAL AND SURETY—CONTRACTOR'S BOND—LIABILITY FOR SUPPLIES—RENT OF TEAMS—BURDEN OF PROOF. In an action upon a contractor's bond to pay for supplies actually furnished and used in the construction of the contract, seeking to recover the reasonable rental value of teams, the surety is liable only for the number of days that the teams were actually employed on the work, the burden of proof as to which is upon the plaintiff.

Appeal from a judgment of the superior court for King county, Humphries, J., entered January 16, 1915, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed as to one defendant; modified as to the other.

McClure & McClure and *Tucker & Hyland*, for appellants.

Corwin S. Shank and *H. S. Belt*, for respondent.

FULLERTON, J.—On August 1, 1913, the appellant John Ruthe entered into a contract with the city of Duvall, a municipal corporation, to improve certain streets of that city, giving a bond, with the appellant United States Fidelity and Guaranty Company as surety, conditioned, among other things, to pay all persons who should supply the contractor with provisions and supplies necessary to carry on the work required by the contract. During the progress of the work, the contractor used certain teams and grading appliances and fixtures, furnished by the respondent State Bank of Seattle. The rental value of these he did not pay, and this

[1]Reported in 156 Pac. 540.

action was instituted by the bank against him and his surety to recover therefor. From a judgment entered in favor of the bank, this appeal is prosecuted.

There was evidence introduced tending to show that the bank had procured the teams and outfit from Kalberg, and had leased them to the Union Contract Company, a corporation formed by Kalberg and contractor Ruthe, for a period which would cover the period of this contract; and based thereon and on certain other evidence in the record, the appellants make the contention that the hiring of this property by Ruthe was from the corporation named, and not the bank, and that the bank has thus no right of recovery. The bank offered evidence tending to show that this lease had been abrogated by the parties and a new contract entered into with Ruthe for this particular contract. The court found in favor of this version of the evidence, and, without reviewing it in detail, we think it in accord with the fact.

On the amount of the recovery, the court found that the teams had been employed by Ruthe on the work for a period equivalent to 965 days for one team; that their rental value was $2.50 per day, and that the rental value of the grading outfit for the same period of time was $350, and allowed a recovery for the aggregate of these sums, less $1,673 which it found to be the reasonable cost of feeding and caring for the teams during the period; the amount of the judgment being $2,054.90.

The appellants contend that the amount of the recovery is too large. From the record, we have not been able to discover on what basis the court computed his estimates. The number of days the teams were in Ruthe's possession was shown, and a detailed account of the number of days they were actually employed on the work was kept until August 18, 1913. But whether we allow for the entire period, or whether we take the exact number of days for the time the record was kept and add to it the remaining period, assuming that the teams worked every day, neither calculation

gives the number of days for which the court allowed a recovery. The first method, if our calculations be correct, gives a number somewhat in excess of the number of days allowed, while the second method gives a less number.

It is the bank's contention that it is entitled under the contract to recover rental against both of the defendants for the number of days the teams were in the possession of Ruthe, regardless of whether or not they were worked for the entire period, while the defendants contend that they were entitled to recover only for the number of days the teams were actually worked. It is possible that, as against Ruthe, the true rule is a medium between these contentions; that is to say, the contract being one of rental merely, without definitive terms, the right is to recover for the actual number of days the teams were in a fit condition to work when given reasonable and ordinary care and attention—a number of days which might be greater than the number they were actually worked during the period of possession, but less than the total number of days possession of them was actually held. But, as we say, no record of this was kept either by Ruthe or the bank, and since the duty devolved upon Ruthe to keep the account, his failure so to do would permit a recovery against him for the entire period. As to the surety company, the right of recovery is measured by a different rule. It was not obligated under the contract, but was obligated to pay for supplies actually furnished and used in the performance of the contract in virtue of its bond, which would limit the recovery to the reasonable rental value of the teams for the time they were actually employed on the work. *Kongsbach v. Casey*, 66 Wash. 643, 120 Pac. 108; *National Surety Co. v. Bratnober Lum. Co.*, 67 Wash. 601, 122 Pac. 337.

As to the appellant Ruthe, therefore, the record furnishes no reason for modifying the judgment. The burden being upon him to show a legal reason why he should not be charged a reasonable rental for the teams during the time they were

in his possession, he must be charged with the full time, in the absence of such a showing.

As to the appellant surety company, the recovery is manifestly too large. Being liable for the rental value of the teams only on the principle that the labor of the teams was a "supply" necessary to the prosecution of the work (*National Surety Co. v. Bratnober Lum. Co., supra*), it can be charged with no greater number of days than the teams were actually employed on the work. The burden of making this showing was on the bank, and it is not met by a mere showing that the teams were in the possession of the contractor during the time the work was being prosecuted. Turning again to the record, we find, as we have said, that an accurate account of this time was kept until August 18, 1913, but that no record was kept as to the remainder, although it was shown that they did not work the full time; the work of the teams being interfered with at one time, if not more than one, by the officers of the humane society. For the time actually kept, the teams earned (at the rental rate found to be reasonable by the court, after deducting the cost of their keeping at the ratio also found by the court) the sum of $850.50. Add to this the rental value of the grading outfit, namely $350, the total amount that can be charged to the appellant insurance company, is $1,200.50.

The judgment appealed from is therefore affirmed as to the defendant Ruthe, and reversed as to the defendant United States Fidelity and Guaranty Company, with instruction to enter a new judgment against the last named company fixing its liability on the judgment against Ruthe at the sum of $1,200.50.

MORRIS, C. J., MOUNT, ELLIS, and CHADWICK, JJ., concur.

[No. 12953. Department One. April 12, 1916.]

OLOF SUNDSTROM, *Respondent*, v. PUGET SOUND TRACTION, LIGHT & POWER COMPANY, *Appellant*.[1]

NEGLIGENCE—INJURIES TO CHILDREN—CONTRIBUTORY NEGLIGENCE OF PARENT. It is not contributory negligence, as a matter of law, to send two children, aged seven and nearly four years of age, on an errand a few blocks, in broad daylight, in a residence district.

STREET RAILROADS—INJURY TO PERSONS ON TRACKS—SPEED LIMIT. The speed limit for street cars in a "settled residential district" includes a locality near a suburban business district, although there were no houses immediately abutting on the street for about a block and a half at the place where an accident occurred.

SAME—INJURY TO PERSONS ON TRACKS — NEGLIGENCE — OPERATION OF CARS—EVIDENCE—QUESTION FOR JURY. The negligence of a motorman in running down a child of tender years is a question for the jury, where he saw the child and his older sister in the act of crossing the street when half a block away, at which time he saw the older child cross the track, and the younger child stop near the track, he was exceeding the speed limit and going 15 to 16 miles an hour, approaching a curve for which he started to slow down when two or three car lengths away from the child, and was going 12 to 15 miles an hour when the child, only six or seven feet from the rails, darted in front of the car.

SAME. The fact that the car could not have been stopped in time, after the child started to cross the tracks, does not establish due care in approaching the child, where the motorman saw him pause near the track.

SAME — INJURY TO PERSONS ON TRACKS — NEGLIGENCE—DEFECTIVE FENDER—QUESTION FOR JURY. Negligence in failing to equip a street car with a sufficient fender, is a question for the jury, where there was evidence that the fender stood eighteen inches above the rails, and that it was practical to equip it with one standing six inches above the rails, which might have saved the child if, as testified, he had started to rise when the car struck him.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 15, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death, after a trial on the merits. Affirmed.

[1]Reported in 156 Pac. 828.

James B. Howe and *A. J. Falknor*, for appellant.

Walter S. Fulton and *Arthur E. Griffin*, for respondent.

ELLIS, J.—Action in tort by a father to recover for the death of his child, a boy three years and nine months old. The child was run over by one of defendant's electric street cars, on Fourteenth avenue northwest, between 67th and 65th streets, in the city of Seattle.

Fourteenth avenue northwest runs north and south. The street car line terminates at West 70th street, which intersects the avenue at right angles. Three blocks south of West 70th street is West 67th street, and two blocks further south is West 65th street, both of which also intersect the avenue at right angles. West 66th street is unopened. At the intersection of the avenue and West 65th street, the street car line turns sharply to the east onto the latter street. A short distance north of this curve, on the west side of the avenue, is a telephone pole upon which is a stop sign as a notice to the operators of south bound cars to diminish speed in order to make the sharp curve with safety.

Between five and six o'clock on the afternoon of September 3, 1914, the mother of the children sent the little boy and his sister, seven years old, on an errand to a grocery store located near the terminus of the car line. Plaintiff and his family reside west of and near the intersection of 65th street with the avenue, the exact location not being shown. The avenue is unpaved, but has sidewalks, wooden on the west side and cement on the east. Though it was unnecessary for the children to cross the street car track, in returning home they went over to the east side of the avenue and amused themselves by rolling along the cement sidewalk certain cans which they had purchased. When they reached a point where a path crosses the avenue diagonally, a little to the north of the above mentioned telephone pole, they started across the street.

The manner in which the accident happened, as detailed by the motorman, is substantially as follows: The street car left the end of the line on this, its last trip for the day, at a little before 5:55, probably half a minute ahead of scheduled time. The car had gone about one-third of a block south of the intersection of 67th street and the avenue when he noticed the two children starting to cross the street. When they were near the middle of the street, the little girl ran across the track. The little boy stopped about six or seven feet from the east rail of the track. We now use his own language:

"I expected him to stay there until I got by. The girl stopped on the other side of the street, and of course I couldn't tell if she said anything or not; she turned around as if she spoke to him. Probably we were not less than a half a car length from where the child was standing when he made a dart across the street. As soon as he did that I—there was only one thing I could do, was to reverse my car and feed up the emergency. The child was six or seven feet from the rail when he started to make this dart across the street. The little fellow stumbled on the rail. He fell down perfectly flat over the rail. I was right on top of him when he fell over the rail. I could not have been any more than a couple of feet, two or three feet from him when he fell. My car did not knock him down. I reversed the car and fed her up, put the wheels the other way. By that time the fender was right over him. He fell almost the instant the fender went over him. Then my car went almost a car length, I should say; probably a little more. Then I jumped out of the car and the little boy was right in front of the rear truck. When the little boy started to dart across the track when the car was half a car-length away, the car was going twelve or fifteen miles an hour."

On cross-examination, he further testified:

"I started to stop the car when I was probably about two or three car lengths back of where I hit the little boy. I would not say I was going fifteen miles an hour at the time I ran over the child. I said twelve to fifteen miles. When I commenced to bring my car to a stop two or three car lengths back, I was going about fifteen or sixteen miles an hour. The

car was slowing down. I had a good distance to go yet. I first saw the little child starting to cross the street about a half a block away. The little boy and girl were then together in the street."

His testimony shows that this diminution of speed was because of the safety sign.

Negligence is charged in the following particulars: (a) operation of the car at an excessive rate of speed and in violation of a city ordinance; (b) failure to give warning of the approach of the car; (c) equipment of the car with an insufficient fender; (d) failure of the motorman to stop the car after he saw or should have seen the child's danger. Defendant denied negligence and set up contributory negligence of plaintiff as an affirmative defense. The trial resulted in a verdict for plaintiff in the sum of $875. At appropriate times, defendant moved for a nonsuit, for a directed verdict, and for judgment *non obstante*, all of which were denied. From the judgment entered upon the verdict, defendant appeals.

It is first contended that the plaintiff was guilty of contributory negligence in allowing the child to be on the street attended only by his sister seven years old. Appellant relies upon our decision in *Vinnette v. Northern Pac. R. Co.*, 47 Wash. 320, 91 Pac. 975, 18 L. R. A. (N. S.) 328, in which case parents were held guilty of contributory negligence, precluding recovery, in permitting a child six years old unattended to cross and play upon the tracks of a switch yard near their home, where it was killed by a switching train. Though in that case there was some evidence that residents of the neighborhood were accustomed to cross the switching grounds, it was not a public street. The child was technically a trespasser with the knowledge and connivance of the parents. The case here falls directly within our holding in *Tecker v. Seattle, Renton & S. R. Co.*, 60 Wash. 570, 111 Pac. 791, Ann. Cas. 1912 B. 842, a case closely analogous to this upon the facts. There the mother of a child of six

years sent him with his sister of ten to the postoffice two blocks distant, when he was killed by a street car. We held that the parents were not guilty of contributory negligence, as a matter of law, but that the question was one for the jury. While the children in the case here were considerably younger, the evidence indicates that the girl was active and intelligent. According to the weight of authority, it cannot be said that the sending of these two children on the errand in question, on a public street, in broad daylight, in a residence district such as this, was contributory negligence, as a matter of law. *Ihl v. Forty-second Street & G. S. F. R. Co.*, 47 N. Y. 317, 7 Am. Rep. 450; *Collins v. South Boston R. R.*, 142 Mass. 301, 7 N. E. 856, 56 Am. Rep. 675; *Adams v. Metropolitan St. R. Co.*, 60 App. Div. 188, 69 N. Y. Supp. 1117; *Kennedy v. Hills Bros. Co.*, 54 App. Div. 29, 66 N. Y. Supp. 280; *Dahl v. Milwaukee City R. Co.*, 62 Wis. 652, 22 N. W. 755; *True & True Co. v. Woda*, 201 Ill. 315, 66 N. E. 369; *Cameron v. Duluth-Superior Traction Co.*, 94 Minn. 104, 102 N. W. 208.

It is next urged that the record is wholly devoid of evidence that defendant was negligent. As to the charge of insufficient warning, this may be granted; but as to the other charges, we are clear that the evidence presented a case for the jury.

We have repeatedly held that an act done in violation of positive law is negligence *per se*, in the absence of exculpatory circumstances amounting to necessity. *Johnson v. Heitman*, 88 Wash. 595, 153 Pac. 331, and decisions there cited. A city ordinance in evidence provides that:

"No driver shall propel or cause to be propelled any street car within the business or settled residential districts at a speed exceeding twelve miles an hour." Seattle Ordinance, No. 28,563, par. 15.

The testimony of the motorman himself leaves hardly a doubt that this ordinance was being violated up to the very time of the accident. He said that, when he first saw the

children starting across the street, half a block away the car was running at from fifteen to sixteen miles an hour; that he started to stop the car in order to make the curve two or three car lengths before he hit the child, and was then going at twelve to fifteen miles an hour. He said, "I would not say I was going fifteen miles an hour when I ran over the child. I said twelve to fifteen miles."

But appellant asserts that, because there were no houses immediately abutting on this street for about a block and a half at this place, it was not within a "settled residential district." The evidence, however, shows that the properties on the side streets were built up and that, at the end of the line a short distance away, there was a suburban business center consisting of several stores. The ordinance does not say "block," but "district." It does not say "densely settled" but "settled." A district according to Webster's International dictionary is a "portion of territory of undefined extent." We must give to the word its ordinary meaning of a region or locality.

Nor do we find merit in the claim that, because the ordinance is penal, it is void for uncertainty in not defining the word "district." That word is so well understood in ordinary parlance as to require no more specific definition.

But aside from negligence in law consisting in the violation of the ordinance, the question of negligence was one for the jury. The motorman saw the children in the act of crossing the street when the car was about half a block distant; saw the little girl cross the track and the little boy stop almost upon the track for what must have been but an instant; saw the little girl stop, look back and apparently speak to the boy. It was clearly for the jury to say whether, in the exercise of reasonable prudence, he should not have anticipated that the child would probably attempt to cross the track and join his sister. The car throughout this distance was running, according to the motorman's own testimony, at from twelve to fifteen or sixteen miles an hour. It

must have made that distance in five or six seconds. The child could hardly have stood still for more than a barely appreciable time after his sister left him; since, when the motorman first saw them about half a block distant, they were moving across the street.

It is argued that there is not a syllable of evidence in the record that the car could have been stopped in time to avoid accident had it been going at less than twelve miles an hour. True, the evidence is not there in syllables, but the evidence of facts from which the jury might draw the inference is there. If, as the motorman testified, the car going between twelve and fifteen miles an hour was actually stopped in about its length, then surely the jury were justified in finding that, had it been running at such a rate as the position of a child of such tender years would have dictated to a reasonably prudent operator, it could have been stopped in time to have saved this child's life. What is a reasonable rate of speed is always a relative question to be determined by circumstances. In approaching small children, evidently bent upon crossing the street, a reasonable rate would be much less than what might be considered reasonable under other circumstances. Like other situations calling for the exercise of reasonably prudent conduct, the question here was one for the jury.

It is argued that, when the motorman saw this child pause near the track, he was not bound to anticipate that it would suddenly run in front of the car. Several cases from other jurisdictions are cited which, in a general way, seem to sustain this argument, but in none of them were the facts parallel to those here presented. In nearly all of them there was lacking anything in the conduct of the child to indicate an intention to cross the track, and in one of them it was merely held that the finding of the jury upon the subject was binding upon the appellate court. So here, had the jury found for defendant, we would not have felt warranted in disturbing the verdict upon a state of facts from which it is evident rea-

sonable minds might draw different inferences. On this, as on other questions, we think the case is ruled by our own decision in *Tecker v. Seattle, Renton & S. R. Co., supra.*

As to the charge that the car was not equipped with a reasonably safe fender, the evidence was conflicting. There was some evidence tending to show that the fender stood at least eighteen inches above the rails of the track. There is ample evidence to show, and the fact seems to be conceded, that it was practicable to have used a fender standing not more than six inches above the track. While there was some evidence that a fender, even at the latter height, would have passed over the boy's body when lying prone upon the track, there was also some evidence that the boy had started to rise when the car struck him. The question was one for the jury. *Tecker v. Seattle, Renton & S. R. Co., supra.*

Finding, as we do, that the evidence was sufficient to carry to the jury the questions of negligence, contributory negligence, and proximate cause, we cannot disturb the verdict.

The judgment is affirmed.

MORRIS, C. J., MOUNT, FULLERTON, and CHADWICK, JJ., concur.

[No. 13111. Department Two. April 17, 1916.]

N. R. SYLVESTER *et al.*, *Appellants*, v. FRANKLIN COUNTY, *Respondent*.[1]

APPEAL—JURISDICTION—"VALIDITY" OF TAX. An action does not "involve the validity of a tax," within Const., art. 4, § 4, limiting the jurisdiction of the supreme court in other civil actions, where the only question involved was whether a judgment entered in a former action compromising past taxes included the tax for the year 1908; since the question at issue was not the legality of the tax as far as the power of the taxing officers was concerned, but only the effect of the judgment in the prior proceedings.

Appeal from a judgment of the superior court for Franklin county, Linn, J., entered July 20, 1915, dismissing an action to recover a tax, paid under protest, after a trial to the court. Appeal dismissed.

Driscoll & Leonard, for appellants.

A. J. Elrod, for respondent.

PARKER, J.—The plaintiffs, Sylvester and others, seek recovery of the sum of $146.70 from the defendant, Franklin county, paid by them under protest to the treasurer of that county in November, 1911; being the amount levied by the taxing officers of that county as taxes for the year 1908, on certain lots in the town of Pasco owned by the plaintiffs, who claim that this sum was unlawfully exacted from them as taxes levied upon the lots for the year 1908. Trial in the superior court for Franklin county resulted in judgment against the plaintiffs denying them the relief prayed for, from which judgment they have attempted to appeal to this court.

Counsel for respondent Franklin county has moved to dismiss the appeal, challenging the jurisdiction of this court and invoking the provisions of art. 4, § 4, of our constitution limiting the appellate jurisdiction of this court as follows:

[1]Reported in 156 Pac. 843.

"The supreme court shall have . . . appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars unless the action involves the legality of a tax . . ."

We are thus confronted with the question as to whether or not this action "involves the legality of a tax," within the meaning of this provision of the constitution.

In June, 1902, the superior court for Franklin county rendered a judgment of foreclosure, ordering the sale of these lots, among others, in satisfaction of taxes. At the sale had in pursuance of that judgment, Franklin county became the purchaser of the lots for want of other bidders. Thereafter, an action was commenced in the superior court for Franklin county, by the owners of the lots, seeking a decree setting aside the judgment of foreclosure and sale to the county thereunder, in which action judgment was rendered on June 13, 1908, as prayed for, in pursuance of a compromise and stipulation between the parties to the action. In pursuance of that compromise and judgment thereon, $2,000 was paid to the treasurer of Franklin county on July 8, 1908, in full satisfaction of the taxes involved in that action, which, as claimed by appellants, were all the taxes levied or which could have been lawfully levied against the lots for the years prior to and including the year 1908. Thereafter, the taxing officers of Franklin county, being of the opinion that the compromise and judgment rendered in pursuance thereof did not result in satisfying taxes chargeable against the lots for the year 1908, levied upon the lots taxes for that year to the amount of $146.70, being the taxes here involved.

It is plain from the record before us that no other tax was ever levied for the year 1908 against these lots other than the tax here involved, which was paid by appellants on November 20, 1911. It is equally plain that this tax was not il-

legal and could not be successfully challenged, in so far as the power of the taxing officers of the county is concerned, under the constitution and revenue laws of this state. If the tax was unenforcible, it was only so because of the compromise and judgment rendered in pursuance thereof above noticed. In other words, the question of the enforcibility of this tax against the lots is not a question of its legality, in so far as the power of the taxing officers is concerned, under the constitution and laws of this state; but, as said by counsel for appellants in their brief:

"The only question in issue, is, what effect shall be given to the judgment and proceedings had in the prior suit,"

referring to the action in which the compromise was had and judgment rendered thereon.

We are constrained to hold, in the light of these facts, that this action does not involve the "legality of a tax," within the meaning of the above quoted constitutional provision limiting the appellate jurisdiction of this court. In *Thomas v. Lincoln County*, 41 Wash. 150, 83 Pac. 18, it was held that an action involving merely an excessive tax, rendered so because of mistake of the assessor in stating an excessive number of acres in a tract, resulting in an excessive valuation and tax, did not involve the "legality of a tax," within the meaning of this constitutional provision limiting the jurisdiction of this court; and that the judgment of a superior court rendered in the action to recover such excess tax paid by the owner, the amount involved being less than $200, was final and not appealable to this court. So, we think, the question involved in this case is not one of the legality of the tax, within the meaning of the constitutional provision above quoted; but it is only a question of whether or not the tax involved has been satisfied by the compromise and judgment rendered thereon. There has come to our attention but few authorities touching this question. Observations made in the following decisions, we think, are in harmony with the conclusions we here reach: *Stubbs v. McGuire*, 32 La. Ann.

817; *Bush v. Police Jury*, 39 La. Ann. 899, 2 South. 790; *State ex rel. Equitable Life Assur. Soc. v. Court of Appeals for Parish of Orleans*, 112 La. 399, 36 South. 472.

We conclude that this court has no appellate jurisdiction of this case, because of the fact that it is a civil action at law for the recovery of money only, that the amount in controversy is less than $200, and that it does not involve "the legality of a tax," within the meaning of the constitutional provision above quoted. The appeal is therefore dismissed.

We here note the decisions of this court in *Prentice v. Franklin County*, 54 Wash. 587, 103 Pac. 831, and *State ex rel. Prentice v. Superior Court*, 86 Wash. 90, 149 Pac. 321, as being of interest in connection with the history of this controversy, though these decisions have no controlling force upon this appeal.

MORRIS, C. J., MAIN, and HOLCOMB, JJ., concur.

[No. 13156. Department Two. April 17, 1916.]

W. W. ZENT, *Respondent*, v. H. C. LEWIS, *Appellant*.[1]

CONTRACTS—VALIDITY—DURESS. The threat to bring a civil suit for damages is not duress, where there was belief in good faith that there was in law a good cause of action.

MORTGAGES—CONSIDERATION—RELEASE. The release of what the mortgagees in good faith believed to be a good cause of action against the mortgagors is, *prima facie*, sufficient consideration for the note and mortgage.

Appeal from a judgment of the superior court for Franklin county, Linn, J., entered March 16, 1915, upon findings in favor of the plaintiff, in an action for the foreclosure of a mortgage, tried to the court. Affirmed.

E. B. Quackenbush, for appellant.

Ed B. Powell, for respondent.

[1]Reported in 156 Pac. 848.

PARKER, J.—The plaintiff Zent seeks recovery upon a promissory note, and the foreclosure of a mortgage deed upon land in Franklin county, securing the same, given by defendant Lewis on March 28, 1914. Trial in the superior court for Franklin county resulted in judgment and decree of foreclosure in favor of the plaintiff as prayed for, from which the defendant has appealed to this court.

The execution of the note and mortgage deed is admitted by appellant. His defense is that there was no consideration for their execution and that their execution was procured from him by respondent by duress. In March, 1914, the parents and guardians of a Miss Johnson, a girl about sixteen years old, placed in the hands of the law firm of which respondent is a member a claim for damages in behalf of their daughter against appellant, which damages were claimed to have resulted to their daughter from an assault made upon her by appellant in that he took improper liberties with her. Shortly thereafter, on March 18, 1914, respondent's law firm addressed a note to appellant asking him to come to their office. A day or two later, he went to their office, where the Johnsons' claim for damages was made known to him and where he was shown and read a prepared complaint in a contemplated action for damages against him based upon his alleged assault upon Miss Johnson, the amount of damages so claimed of him being $5,000. Negotiations then commenced between him and respondent, as attorney for the Johnsons, looking to a settlement of this claim for damages. Appellant visited respondent at his office continuing these negotiations on three different days, when they arrived at a tentative settlement to the effect that appellant was to pay respondent for the Johnsons $750 in full settlement of the damages claimed; it being agreed that he would execute this note and mortgage to secure the same, maturing on the 1st day of December, 1914. He then executed the note and gave it to respondent, the same being in respondent's name though for the benefit of the Johnsons; and the mortgage deed, hav-

ing been prepared, was given to him, which he took away and a short time later brought it back and gave it to respondent, it having in the meantime been executed by both himself and wife. His wife was not present during any of the negotiations and did not know that the note had been executed, evidently treating the mortgage deed, which was in the form of an absolute deed, as a conveyance. In the meantime respondent had procured from the Johnsons a release of the claimed damages acknowledging "full and complete satisfaction of any and all claims or demands we or any of us have or claim to have against said Henry C. Lewis by reason of anything he has said or done to" Miss Johnson. This release was signed by Miss Johnson and also both of her parents, and was delivered to appellant.

Appellant testified, among other things, in substance, that respondent had threatened him with criminal prosecution and also with publicity of the affair out of which the damages were alleged to have grown, and that it was these threats that induced him to settle the matter by the execution of the note and mortgage. We have no other testimony given in appellant's behalf in support of this version of the settlement. This was positively denied by respondent on the witness stand; and respondent's law partner testified to facts which are inconsistent therewith, though he was not present when the threats were alleged to have been made by respondent to appellant. Appellant made no claim that the note and mortgage were procured from him by duress until he verified his answer in this case on January 29, 1915, ten months after the execution of the note and mortgage, and two months after their maturity.

We have reviewed the evidence with care and agree with the learned trial court that it preponderates in favor of respondent upon the question of his alleged threat of criminal prosecution. This view would entitle him to judgment, so far as that question is concerned, even though such alleged threat

could amount to duress such as to relieve appellant from liability under the note and mortgage. Of course, it needs no argument to demonstrate that the threat to bring a civil suit to recover damages, as claimed, is not duress, since respondent and the Johnsons in good faith believed that there was in law a good cause of action for such claim. The following decisions of this court support these conclusions and leave little to be said so far as the law of the case is concerned. *Walla Walla Fire Ins. Co. v. Spencer*, 52 Wash. 369, 100 Pac. 741; *Ingebrigt v. Seattle Taxicab & Transfer Co.*, 78 Wash. 433, 139 Pac. 188; *Cornwall v. Anderson*, 85 Wash. 369, 148 Pac. 1.

The contention that the note and mortgage were executed without consideration, we think, finds its answer in the fact that the Johnsons released what they in good faith believed to be a good cause of action, and which we think was, at least, *prima facie* so.

Mrs. Lewis was made a defendant with her husand because of her joining in the execution of the mortgage deed, though she did not sign the note. We have referred to H. C. Lewis as if he were the only defendant and appellant for convenience of expression in our discussion of the case.

The judgment is affirmed.

MORRIS, C. J., HOLCOMB, and MAIN, JJ., concur.

[No. 12780. Department One. April 19, 1916.]

MOTT IRON WORKS, *Respondent*, v. METROPOLITAN BANK, *Appellant*.[1]

APPEAL—REVIEW—DECISION—LAW OF CASE. Where there is no material change in the evidence, a decision as to its sufficiency on a former appeal becomes the law of the case and conclusive on a second appeal.

APPEAL—REVIEW—INSTRUCTIONS. Error cannot be predicated on the refusal to give instructions that are covered in the general charge.

PRINCIPAL AND AGENT—APPARENT AUTHORITY—ACTIONS—INSTRUCTIONS. An instruction that a principal owes the duty to use "reasonable care" to oversee the acts of an agent with reference to his business is not prejudicial where the real point was that he was bound by the apparent authority which he knew, or reasonably should have known, the agent was assuming, and the same was covered by other instructions.

TRIAL—DELIBERATIONS—INSTRUCTIONS—REQUESTS. Upon a request for further instructions, the court may refer the jury to written instructions answering the questions fully, permitted to go to the jury room by agreement of counsel, in the absence of request by counsel for anything more specific.

SAME—DELIBERATIONS OF JURY—INSTRUCTIONS. Admonitions to a jury to consult together and make an effort to agree etc., are not prejudicial where there was nothing said calculated to coerce the judgment or lay the conscience of any reasonable juror.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 18, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract, after a trial on the merits. Affirmed.

Douglas, Lane & Douglas and *G. E. de Steiguer*, for appellant.

McClure & McClure, for respondent.

ELLIS, J.—Action to recover the amount of a check drawn to the order of plaintiff, admittedly collected by defendant

[1]Reported in 156 Pac. 864.

and claimed to have been by it misapplied. The first trial resulted in a verdict and judgment for plaintiff. Upon appeal, that judgment was reversed and the cause was remanded for a new trial. The second trial had a like result. Defendant again appeals. The dominant facts, which are in no material particular changed or modified by the evidence on the second trial, are sufficiently stated in the opinion on the first appeal. The statement there, both as to pleadings and evidence, is by reference adopted as the statement here. *Mott Iron Works v. Metropolitan Bank*, 78 Wash. 294, 139 Pac. 86.

It is asserted that the court erred in denying appellant's challenge to the sufficiency of the evidence and in overruling its motion for a directed verdict. These matters are foreclosed by our former decision. Touching the same claim, we there found that the evidence presented a question for the jury on each of the principal issues of fact made by the pleadings. We said:

"There was proof sufficient for the jury that a special limitation had been imposed upon the agent with regard to his right to direct the disposition of the fund derived from checks payable to the principal, and that the appellant had knowledge of this limitation. Again, there was a question for the jury whether or not the funds derived from the particular check in question had not been first credited to the respondent's account, and afterwards diverted to the private account of the agent contrary to the respondent's express instructions."

If there has been any material change in the evidence, we have failed to discover it and appellant has failed to point it out. Under such conditions, we have uniformly declined to review questions of fact on a second appeal. As to the sufficiency of the evidence, the first appeal settled the law of the case. *Perrault v. Emporium Department Store Co.*, 88 Wash. 578, 145 Pac. 438, and the many cases there cited; *Smith Sand & Gravel Co. v. Corbin*, 89 Wash. 43, 154 Pac. 150; *Hoffman v. Watkins*, 89 Wash. 661, 155 Pac. 159.

It is next claimed that the court erred in refusing to give certain instructions requested by appellant. We have read with care these and, in connection therewith, the instructions as given. We shall not extend this opinion by a detailed comparison. Our examination convinces us that, so far as the requests contained correct statements of law as applicable to the evidence, they are copiously and clearly covered by the instructions given, though in different terms. Error cannot be successfully predicated upon mere forms of expression.

It is further urged that the court erred in the use of the words "reasonable care" in giving the following instruction:

"When the plaintiff put its agent in charge of its business it could not shut its eyes to his acts and escape liability therefor by secret instructions limiting his authority, if it did so. It is under a duty to use reasonable care to oversee how he conducts himself with reference to its business and all of his acts with reference thereto can be shown, whether actual knowledge of each particular act can be brought home to the principal or not."

This criticism seems over-technical. Taken in context, the words criticised do not minimize the duty of the principal to oversee the acts of the agent. The real point is that the principal is bound by every act of the agent within the scope of the apparent authority which the principal knew, or reasonably should have known, that the agent was assuming to exercise, regardless of any secret limitations. This was covered not only by the instruction quoted but by several others.

Basing the claim on the following incident, appellant insists that the court refused to instruct on questions of law propounded by the jury. After the jury had deliberated for some hours, it requested special instructions on the following points:

"(1) Was it necessary for the individual endorsement of H. M. Crane to be on the check in suit in order to transfer title to said check?

"(2) Was it necessary for the individual endorsement of H. M. Crane to be upon said check in order for him to deposit the same in his own account?"

Thereupon the court, addressing the jury, said:

"So far as this first question is concerned, with reference to the reading of the instructions, I should say first that counsel agreed that I might instruct you partly orally and partly in writing and that the instructions need not be written out and taken with you into the jury room. The main and important instructions were written out. They are not in the best shape. Some of it is written in my hand, some of it is interlined, and so forth, but you can gather from these what I said to you, and you will be permitted to take these with you to the jury room now under agreement of counsel. And the question you asked here, after reading certain portions you will find very plainly set forth in the instructions.

"As to the next question, 'Shall we consider the check as an endorsement of H. M. Crane as an individual' and so on, I cannot answer that question. That is one of the facts you have yourselves to decide under the evidence. I am not permitted under the law to tell you those things. The framers of our constitution saw fit to say that the court must not comment upon the evidence; that it must leave that entirely to the jury. The courts must be very particular about that or the supreme court will reverse what we do. I sometimes think that the framers of the constitution made a mistake in that regard, but whether or not they did, that is not for me to say at this time. Because it is the law, I am forbidden to comment upon or refer to anything such as you have called my attention to here.

"The next question comes under the same head as to the signing of H. M. Crane as an individual and so on. That is one of the questions that under the evidence and my instructions you must decide for yourselves."

Among the instructions which had already been given, and which it is stated without denial were thereupon taken by the jury into the jury room for further guidance and as answering these questions, were the following:

"You are instructed, members of the jury, that a check is a negotiable instrument, and that the title to a check or ne-

gotiable instrument is transferable by endorsement and delivery. By endorsement I mean the signature on the back of the check, signed by the payee, by himself or by some authorized agent. A proper endorsement of the check by the payee personally or by his authorized agent, accompanied with delivery thereof, transfers absolute title in and to that check to the person receiving the same, who thereupon becomes the holder and owner of the check.

"The title to the check in question in this case was in the plaintiff and remained in the plaintiff until, by some act of plaintiff or its authorized agent, the title passed to another. If you find from the evidence that H. M. Crane as agent of the plaintiff, without real or apparent authority from plaintiff, endorsed the check in question in the form shown by the check, such endorsement and the delivery of the check to the defendant had no effect on the title of the plaintiff . . .

"It is the law that a limited authority to endorse checks for deposit or collection only does not carry with it authority generally to assign or transfer title to the check from the payee. Hence, an endorsement on the back of the check of the payee's name by his agent may be for the limited powers only of depositing the check with the bank so that the bank can collect it, or such endorsement may be for the general purpose of transferring the title to the check. If the authority of Crane was limited to endorsing for deposit only to plaintiff's credit, and if the bank knew of that fact, then the bank had no right to place it to the credit of any person except that of the plaintiff; but if Crane had authority to endorse generally, not only for deposit but likewise for the purpose of negotiating or transferring title to said check, then the bank would have a right dependent on the facts and the rule hereafter stated, to treat the check thus endorsed as having been transferred or assigned by plaintiff to Crane as Crane's personal property, to be controlled as Crane might direct."

It is obvious that these instructions answered the jury's questions correctly and as fully as the court could have answered them without assuming to determine for the jury questions of fact as to the actual and apparent scope of the agent's authority which were in a sense involved in the jury's questions. We assume that the court stated the truth when

he told the jury that these instructions were permitted to be taken into the jury room at that time "under agreement of counsel." Counsel's attention to the court's purpose was then challenged by the remark that these instructions fully answered the questions. If anything more specific was desired, counsel should then have requested it. We find nothing prejudicial in this incident.

Before returning the jury to the jury room, the court admonished its members at considerable length to the effect that they should listen to each other, consult with each other, and make an effort to agree; that they should not be stubborn; that they need not be convinced beyond a reasonable doubt, but should bring in a verdict upon what might seem to them a fair preponderance of the evidence; this and much more to the same effect. It is urged that this tended to minimize the essential duty of a juror to return a verdict according to his own judgment and conscience. We have read the court's admonition with much care. We find nothing in it calculated to coerce the judgment or lay the conscience of any reasonable juror.

A careful consideration of the entire record convinces us that the appellant has had a fair trial. The judgment is affirmed.

MORRIS, C. J., MOUNT, and FULLERTON, JJ., concur.

[No. 13035. Department One. April 19, 1916.]

THE CITY OF SEATTLE, *Respondent*, v. DEXTER HORTON TRUST AND SAVINGS BANK, *Appellant*.[1]

EMINENT DOMAIN—PROCEEDINGS—DAMAGES—ASSESSMENT. A platted block of tide lands and contiguous unplatted uplands, are properly considered as separate parcels in awarding damages in eminent domain proceedings.

SAME—DAMAGES—EVIDENCE—ADMISSIBILITY. Upon an issue as to the damages to be awarded for lands condemned for a street for which no grade had been established, proof as to what would be a reasonable grade is immaterial; as it would in no way enhance or diminish the damages.

Appeal by defendant from a judgment of the superior court for King county, Tallman, J., entered June 16, 1915, upon the verdict of a jury awarding damages in eminent domain proceedings. Affirmed.

Clise & Poe, for appellant.

James E. Bradford and *Geo. A. Meagher*, for respondent.

MOUNT, J.—This is an appeal by a landowner from an award of damages, in a condemnation action for property taken by the city of Seattle for purposes of a public street.

It appears that the appellant owned, within the condemnation district, a block of tide land, known in the record as tide land block 101. Immediately to the north of this block, was a large unplatted tract of land also owned by the appellant. This acreage or unplatted land extended from tide water to the summit, or very close to the summit, of Magnolia Bluff. The easterly portion of this unplatted land consisted of a gulch or slough, known in the record as Wolfe creek. The tract condemned was a strip one hundred feet wide and about half a mile long, running northerly along the bottom of this gulch from the tide land to the limit of the appellants holdings. The taking of this one hundred-foot strip left the ap-

[1]Reported in 156 Pac. 844.

pellant a narrow piece of land eighty feet in width, bordering along the eastern margin of the strip taken, and extending its entire length. The city condemned and took all of the tide land block 101. This block was adjacent and contiguous to the gulch.

At the trial, the city treated the condemnation as comprising three distinct tracts; and upon the trial the jury returned a verdict for the value of each tract separately. The first tract was all of tide land block 101; the second consisted of a strip one hundred feet wide commencing at the tide land block and extending through the gulch some 1,190 feet. No point is made upon the third tract.

Two contentions are made by the appellant, to the effect that the city was not authorized to divide the unplatted tract of land from the platted block and treat the two pieces of property as separate property. Second, it is urged that the court erred in refusing to receive evidence relating to the reasonable grade for the street upon the land condemned.

It is contended by the appellant upon the first question that the platted block, being contiguous to the unplatted land, was a part thereof, and for that reason the court erred in permitting damages to be assessed for each of these tracts separately. In *In re Queen Anne Boulevard*, 77 Wash. 91, 137 Pac. 435, we held it was error to treat two platted lots as one tract of land where they were unoccupied and not used in common and each was of sufficient size to admit of separate use. It is conceded in this case that the platted block of tide land, and also the unplatted land, was vacant and unimproved property. But we think the mere fact that this tide land lot had been platted was sufficient, under the *Queen Anne Boulevard* case, to require the city to treat it as a separate tract. While it is no doubt true that the city would have no right to divide property into separate parcels which was not naturally divided, yet, where a part of a tract had been platted into a lot, and another contiguous tract had not been platted, under the case cited, it was the duty of the city to

treat the two tracts as separate tracts. There was, therefore, no error in treating the property as separate tracts.

Upon the trial of the case, one of the engineers for the city testified, in substance, that a seven per cent grade would be a reasonable grade upon which the street might be constructed upon the land taken. A witness was called by the appellant who testified that a five per cent grade would be a reasonable grade. The court thereupon refused to submit this evidence to the jury, and the appellant insists that this was prejudicial error. The case of *Spokane v. Thompson*, 69 Wash. 650, 126 Pac. 47, is relied upon to sustain this contention. But that was a case where there was a change of a grade already established; and what we said in that case had reference to that condition and not to a condition where there had been no grade established. In this case, it is conceded that the city had not established a grade; and whether a five per cent grade or a seven per cent grade, or whether any other grade would be reasonable, it seems is entirely irrelevant to the issue presented in this case. When the city undertakes to build a street over the land taken, it no doubt will establish some grade. But whether it will establish a five per cent grade or a seven per cent grade, or some other grade, is not a material question to be considered in this case in order to determine the damages for the land taken. It may be true that a five per cent grade will be a more reasonable grade than a seven per cent grade. It may be that neither of these grades is proper. The grade, according to its feasibility will no doubt be established by the city when it comes to improve the street. Proof, therefore, of what may or may not be a reasonable grade would tend in no way to enhance or diminish the damages; since neither grade has been established and neither may be established. We are satisfied, therefore, that the court did not err in excluding this evidence from the jury.

We find no error in the record, and the judgment is therefore affirmed.

MORRIS, C. J., ELLIS, and FULLERTON, JJ., concur.

[No. 13057. Department Two. April 19, 1916.]

ANNA A. BAYLEY, *Respondent*, v. NATIONAL POLE COMPANY *Appellant*.[1]

TROVER AND CONVERSION — CONSTRUCTIVE CONVERSION — PURPORTED SALE. A sale by defendant of all cedar poles "owned by us at Gray's Spur," when the defendant had no poles there, is a constructive conversion of plaintiff's poles there located and claimed by the vendee.

SAME—EVIDENCE—SUFFICIENCY—ADMISSIBILITY. Upon an issue as to whether defendant converted to its own use certain rejected culls from a lot of cedar poles purchased, by branding them, the fact that it attempted to sell them after removing all it had purchased, is sufficient to raise an inference that it did brand them; and evidence of a witness that some of them which he purchased were so branded is admissible.

EVIDENCE—PAROL EVIDENCE—TO VARY WRITING. A memorandum of sale of "all poles owned by us at Gray's Spur," cannot be explained or varied by oral evidence as to what the vendor intended to sell.

TROVER AND CONVERSION—ACTIONS—INSTRUCTIONS—INTENT. Upon an issue as to the constructive conversion of cedar poles by a sale of the same as poles of the defendant, what the defendant "intended" is merged in the act, and properly omitted from instructions as to what constitutes a conversion.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered February 11, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for conversion, after a trial on the merits. Affirmed.

D. W. Henley, for appellant.

Alva S. Sherlock and *Rochford & Wilson*, for respondent.

HOLCOMB, J.—The question to be determined in this case is whether appellant or some other committed the acts of appropriation constituting a conversion of 519 cedar poles and piles and a quantity of cedar post stock, of the alleged value

[1]Reported in 156 Pac. 867.

of $1,388.20. The verdict was for respondent in the sum of $1,019.30.

Seventeen errors are assigned for the reversal of the judgment, several of which, however, are not argued in the briefs of appellant. Respondent sued as the assignee of the claim of a copartnership consisting of J. L. Bayley and B. F. Seeley. According to respondent's evidence, long prior to the occurrence of the matters complained of, Bayley & Seeley had sold to appellant, and delivered at a landing platform on a railroad called Gray's Spur, in 1907, under a contract, about 1,622 green-cut cedar poles. Appellant caused the poles delivered to be inspected, and those accepted as satisfactory were marked with a stamp with the brand of a diamond-shaped figure having a large K in it and called the "Diamond K" brand. Twelve hundred and ninety-nine of the poles were accepted, and marked or branded with appellant's brand of diamond K. All poles rejected were left unmarked. These poles all remained in the yard, which belonged to Bayley & Seeley, at Gray's Spur, and afterwards appellant loaded and shipped out the 1,299 poles which had been accepted and marked by it. Bayley & Seeley had there also about 785 dead, fire-killed, and defective poles which appellant would not purchase or accept from them, and which were piled in separate piles. These were valuable to make into posts when they were too defective for poles. They were called culls, and appellant refused, under its contract with Bayley & Seeley, to have anything to do with culls. There is no evidence that appellant ever had any other poles at Gray's Spur than the sound cedar poles delivered by and received from Bayley & Seeley.

In 1911, or the first of 1912, Seeley visited the Gray's Spur yard and found and counted 234 of the 785 defective poles they had left there in 1908. Seeley had sold and delivered 240 of them to a concern, which was all that Bayley & Seeley disposed of during that time. On October 7, 1911, appellant, for $375, sold to one George Huscroft, and made a writ-

ten memorandum thereof, "all cedar poles, owned by us [appellant] at Gray's Spur." In January, 1911, appellant had loaded and shipped from the yard 150 poles; in April, 1914, appellant had shipped from the yard 248 poles; making a total of 398 poles shipped therefrom by appellant directly; and there were 50 poles remaining in the yard November, 1914. Huscroft claimed to have counted the poles in the yard before he bought in October, 1911, and then found 573 poles, which he claimed were marked with the brand of appellant. About the time of the sale by appellant to Huscroft, Bayley had contracted with one Bush for the sale of a car-load of the poles, and afterwards Bush loaded three carloads of them, but Huscroft claimed all of them and required Bush to settle for them with him.

I. It is first urged that there is no evidence of any sale by appellant of any unbranded poles, and no evidence of any act of appellant or its agents by which respondent or her assignors were deprived of the possession or control of any unstamped poles belonging to her or them; and that the fact that some other person to whom appellant sold all the poles owned by it at that place, in removing the poles rightfully sold, should, without the connivance of the seller, take other poles not owned by it, although at the same place, would not render appellant liable. But the evidence for respondent tended to show that appellant owned no poles in the Bayley & Seeley yard at Gray's Spur, in October, 1911, and hence had none to sell. The purported sale to Huscroft was a constructive conversion. *Stickney v. Monroe*, 44 Me. 195; *Gilman & Sanborn v. Hill*, 36 N. H. 311; *Aschermann v. Best Brewing Co.*, 45 Wis. 262; *Gibbs v. Chase*, 10 Mass. 125; *Hale v. Ames*, 2 T. B. Mon. (Ky.) 143, 15 Am. Dec. 150; *McPheters v. Page*, 83 Me. 234, 22 Atl. 101, 23 Am. Dec. 772; *Fidalgo Island Shingle Co. v. Brown*, 61 Wash. 516, 112 Pac. 629.

In so far as the failure of the evidence to show any disposition or conversion by appellant of unbranded poles is

concerned, it was the theory of respondent that appellant, at some time, caused the brand to be placed on the poles appropriated by it, although it had previously rejected and refused to have anything to do with them. The direct evidence fails to show any act of placing the brand of appellant upon them; but it was an easy thing to do, and the fact that, when Bayley & Seeley last examined them, they did not have the brand upon them, and that appellant pretended to sell them, thus asserting ownership of them, would create an inference from the circumstances that it did at some time brand them.

II. What has just been said disposes, also, of appellant's second assignment of error argued, that the court erred in admitting the testimony of Bush as to the poles loaded out from the yard by him under his attempted purchase from Bayley which he said were branded with the diamond K stamp, and for which he, on demand, paid Huscroft, who in turn had bought from appellant.

III. On direct examination of witness Leavitt, appellant's manager, who made the sale to Huscroft, he was asked what, in making the sale, he intended to sell to Huscroft. He answered that he intended to sell all the poles owned by the National Pole Company. Objection was made and, on motion, this answer was stricken on the ground that the instrument speaks for itself. This is alleged as error. It was not error. The answer of the witness, in fact, exactly repeats the terms of the memorandum given to Huscroft, "We will sell you all the poles owned by us at Gray's Spur landing." It could not be made more comprehensive nor could it be explained or varied.

IV. A number of errors are alleged in the refusal of the court to give certain instructions. They are lengthy and amplify every phase of the case. Some are based upon the theory of appellant that conversion, upon which trover may be based, *must be* a positive, tortious act, and that mere knowledge of such act would not be conversion. However,

the court very concisely and clearly instructed the jury as to what would render defendant liable and what would not. They were explicitly told that, "unless plaintiff proves that defendant took and converted to its own use, or sold and converted to its own use, poles and timber belonging to plaintiff, she could not recover." This was conformable to the law as stated in *Fidalgo Island Shingle Co. v. Brown, supra*, They were instructed that:

"If you shall find by the evidence that the National Pole Company owned and had poles decked at Gray's Spur upon the date of the memorandum of sale, and sold and received pay for all the poles it then owned at that point, and did not sell any other poles than those belonging to it, then your verdict must be for the defendant, notwithstanding you find that the party purchasing from the defendant, in loading out the poles so purchased, loaded out other poles belonging to plaintiff."

This was given upon request of appellant, except that the words "intend to" were in the requested instruction after the word "not" and before the word "sell," and were omitted by the court, of which omission appellant complains. The words "intend to" were not justified. What the appellant did was what governed. Its intent was merged in its act. The instruction was properly modified and given.

The above, and the three next following instructions, given by the court, clearly, simply, and properly submitted the law applicable to appellant's contentions in the case. The rights of appellant were fully protected by the instructions to the jury, and there was no error in the refusal or the giving of any instruction.

V. There was substantial evidence to support respondent's cause of action, upon all its issues, if believed by the jury, and we find no error which would justify us in reversing the judgment and sending the case back for a new trial. Judgment affirmed.

MOUNT, MAIN, and PARKER, JJ., concur.

[No. 13062. Department One. April 19, 1916.]

CITY SASH & DOOR COMPANY *et al.*, *Respondents*, v. MARGARET BUNN *et al.*, *Appellants*.[1]

APPEAL—DISMISSAL—NOTICE. A motion to strike a transcript and dismiss an appeal must be made on ten days' notice, under supreme court rules 18 and 19.

MECHANICS' LIENS—DURATION—LIMITATIONS—STATUTES. Rem. & Bal. Code, § 1138, providing that no mechanics' lien shall be binding for a longer period than eight months after filing unless an action be commenced within that time to foreclose the lien, is not a statute of limitations, but fixes the duration of the lien.

SAME—FORECLOSURE—NECESSARY PARTIES. The owner of property subject to a mechanics' lien is a necessary party to an action to foreclose the lien.

SAME—FORECLOSURE—JURISDICTION — SERVICE ON NECESSARY PARTIES. Under Rem & Bal. Code, § 1138, limiting the life of a mechanics' lien to eight months after filing unless an action to foreclose be commenced within that time, jurisdiction can be acquired only by service, actual or constructive, upon the owner of the interest sought to be foreclosed within the statutory life of the lien; as the action is not deemed commenced until the necessary parties to its maintenance have been served.

ACTIONS—COMMENCEMENT—FILING AND SERVICE. Under Rem. & Bal. Code, § 220, providing that civil actions shall be commenced by the service of a summons or the filing of a complaint, and that, unless service has been made before filing, the plaintiff shall cause one or more of the defendants to be served personally or commence service by publication within ninety days from the date of filing the complaint, the filing of the complaint is not the commencement of an action, but is abortive unless followed by personal service or the commencement of publication within the ninety days.

MECHANICS' LIENS—FORECLOSURE — PROCEEDINGS — JURISDICTION — COMMENCEMENT OF ACTION—SERVICE OF PROCESS. Personal service of summons must be made upon, or service by publication must be commenced against, necessary parties to an action to foreclose a mechanics' lien, within the eight months limited by Rem. & Bal. Code, § 1138, as the life of the lien unless action be commenced within that time, in order to confer jurisdiction, in view of Laws 1893, p. 407, passed at the same session, providing that civil actions

[1]Reported in 156 Pac. 854.

shall be commenced by the service of summons; although that act was amended (Rem. & Bal. Code, § 220) to provide that civil actions shall be commenced by the service of summons or the filing of a complaint, provided that unless service is had before filing the plaintiff shall cause one or more of the defendants to be served personally or commence service by publication within ninety days from the date of filing the complaint, there being no implication that the special statute was amended by the amendment of the general statute.

SAME—FORECLOSURE—CONSOLIDATION—EFFECT—PROCESS—NECESSITY. The consolidation of actions to foreclose mechanics' liens confers no jurisdiction of cross-complaints or complaints in intervention setting up independent causes of action, unless such claimants serve process upon necessary parties to the action within the time limited for the duration of the lien.

Appeal from a judgment of the superior court for King county, Humphries, J., entered May 11, 1915, upon findings in favor of the plaintiffs, in consolidated actions to foreclose mechanics' liens, tried to the court. Reversed.

George L. Palmer and *Beechler & Batchelor*, for appellants.

Jas. A. Dougan, for respondent City Sash & Door Company.

Reeves Aylmore, for respondent Taylor Mill Company.

ELLIS, J.—Action to foreclose a large number of mechanics' liens on lot 7, in block 42, of T. Hanford's addition to Seattle. The case is here upon the transcript, findings, conclusions and decree, which are so voluminous as to prohibit a statement of more than a bare outline. At the time the work was done, materials furnished and liens filed, covering the period from August 29, 1913, to February 10, 1914, Joseph A. McGinty and wife were the owners of the property. The work was done and the materials furnished at their instance for the construction of two houses, one on the north half, the other on the south half of the lot. On September 30, 1914, McGinty and wife conveyed the south half of the lot to Margaret Bunn and husband; and in October, 1914,

the north half to Louis Bernheim. Originally, four actions were instituted, numbered and entitled on the records of the superior court for King county as follows: Cause No. 97635, Recchio v. McGinty et al., to foreclose a lien on all of lot 7. In this case, cross-complaints in intervention were filed by Charles Denny and S. W. R. Dally. Cause No. 99669, Hanson v. McGinty et al., to foreclose a lien which, also, covered all of lot 7. Cause No. 99054, City Sash & Door Company v. McGinty et al., to foreclose a lien upon the north half of lot 7. In this case, a complaint in intervention was filed by Bass-Heuter Paint Company to foreclose a claim of lien on the entire lot. Cause No. 99056, City Sash & Door Company v. McGinty et al., to foreclose a claim of lien on the south half of lot 7. Four cross-complaints in intervention to foreclose claims of lien were filed in this case, one by D. J. McHugh covering the south half of lot 7; the second, by Taylor Mill Company, originally covering the north half of lot 7 but amended at the trial to cover the south half of the lot; the third, by Arrow Electric Company covering the entire lot; the fourth, by Bass-Heuter Paint Company covering the entire lot.

The court made specific findings as to the time and character of service and persons served with summons, complaint and cross-complaints in each case, and a general finding that no process of any kind or nature was served upon McGinty and wife other than as in the special findings stated.

On December 22, 1914, after all the services that were ever made had been either made personally or commenced by publication, the four cases were consolidated pursuant to stipulation signed by the attorneys for the various plaintiffs and interveners.

On February 18, 1915, Margaret Bunn and husband and Louis Bernheim appeared specially and moved to dismiss the several causes of action on the ground that they were then the owners of lot 7, had never been served with summons in any of the actions except on the cross-complaint of Arrow

Electric Company, and that none of the actions, either by complaint or cross-complaint, had been commenced within eight months after the filing of the respective claims of lien. The motion was denied, and Bernheim and the Bunns were made additional parties defendant to all of the complaints and complaints in intervention, over their objections. This was long after the expiration of eight months from the filing of any of the lien claims. Thereupon the Bunns and Bernheim filed separate answers, setting up substantially the same facts as advanced on their motions. After trial, the court made findings of fact and conclusions of law, and thereon entered personal judgments against McGinty and wife for the amounts found due to each of the respective lien claimants, and a decree establishing as valid all of the liens claimed, and ordered sale of the two half lots and the buildings thereon to satisfy the liens so established against each half respectively, surplus, if any, of the proceeds of the north half to be paid to Bernheim and of the south half to the Bunns. The defendants Margaret Bunn and husband and Louis Bernheim appeal.

No brief has been filed by any respondent in defense of the decree on the merits. Respondents City Sash & Door Company and Taylor Mill Company, on the hearing in this court, filed identical motions to strike the transcript and dismiss the appeal on the ground that no statement of facts has been brought up and no exceptions were taken to the court's findings. There is no merit in the motions. Moreover, they were presented on only three days notice. Our rules require ten days notice. Rem. & Bal. Code, § 1733 (P. C. 81 § 1219), Supreme Court Rules 18 and 19.

No exceptions were taken to the findings. Appellants concede that they are sufficient to sustain the judgments and decree in favor of Recchio, Denny, Dally and Arrow Electric Company, but insist that they are wholly insufficient to sustain any decree establishing liens in favor of the respondents Hanson, City Sash and Door Company, Bass-Heuter Paint

Company, McHugh and Taylor Mill Company, in that they affirmatively show that no service of process conferring jurisdiction as to any of these was made upon the owner of the premises within the life of any of their liens.

The special statute limiting the life of mechanics' liens, Rem. & Bal. Code, § 1138 (P. C. 309 § 71; Laws 1893, p. 35, § 9) declares:

"No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim has been filed unless an action be commenced in the proper court within that time to enforce such lien; . . ."

This is not a statute of limitations. It "limits the duration of the lien." *Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 397; *Davis v. Bartz*, 65 Wash. 395, 118 Pac. 334. The general statute governing the commencement of actions passed at the same session of the legislature (Laws 1893, p. 407, § 1) declared:

"Civil actions in the several superior courts of this state shall be commenced by the service of a summons, as hereinafter provided."

The last quoted section was amended in 1895 (Laws 1895, p. 170, § 1; Rem. & Bal. Code, § 220 [P. C. 81 § 131]), to read as follows:

"Civil actions in the several superior courts of this state shall be commenced by the service of a summons, as hereinafter provided, or by filing a complaint with the county clerk as clerk of the court: Provided, that unless service has been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint."

Unless the special statute (Id., § 1138) was, by implication, also amended by the amendment of the general statute governing commencement of actions, thus extending the life of the lien merely by filing a complaint, it is plain that the

lien is lost as to any necessary defendant who is not served with summons within the eight months.

The owner of property subject to a mechanics' lien at the time of suit is a necessary party to an action to foreclose the lien. The proceeding to establish and foreclose the lien is, in a sense, *in rem*. Jurisdiction of the subject matter can only be acquired by service, actual or constructive, upon the owner of the interest sought to be subjected and within the statutory life of the lien. *Littell & Smythe Mfg. Co. v. Miller*, 3 Wash. 480, 28 Pac. 1035; *Sagmeister v. Foss*, 4 Wash. 320, 30 Pac. 80, 744; *Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 397; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; *Northwest Bridge Co. v. Tacoma Shipbuilding Co.*, 36 Wash. 333, 78 Pac. 996; *Rees v. Wilson*, 50 Wash. 339, 97 Pac 245; *Pickens v. Polk*, 42 Neb. 267, 60 N. W. 566; *Ortwine v. Caskey*, 43 Md. 134; *Hughes v. Torgerson*, 96 Ala. 346, 11 South. 209, 38 Am. St. 105, 16 L. R. A. 600.

Our own decisions above cited were nearly all in cases where it was sought to foreclose liens on community property by serving only the husband within the life of the lien. It was held in all of these that the wife was a necessary party because the community of which she was a member was the owner of the property. In those cases, it was also held that service of summons on one spouse is not the commencement of an action as to the other; and in the *Peterson* and *Northwest Bridge Company* cases, it was held that the bringing in of the wife subsequent to the expiration of the lien is of no avail and confers no jurisdiction to enforce the lien. We have also repeatedly held—and the holding was inevitable—that, under the provisions of § 220 above quoted, the filing of the complaint is not the commencement of an action but only a tentative commencement, wholly abortive unless followed by personal service on one or more defendants, or by the commencement of service by publication within ninety days. "Both must exist before the action is commenced." *Deming Inv. Co. v. Ely*, 21 Wash. 102, 57 Pac. 353; *Fuhrman v.*

Power, 43 Wash. 533, 86 Pac. 940; *McPhee v. Nida*, 60 Wash. 619, 111 Pac. 1049.

When it is remembered that § 1138 is not a mere statute of limitations limiting the time of commencing actions, but fixes a limit to the very existence of the lien, it is palpable that no action to foreclose a mechanics' lien can be deemed commenced until the *necessary parties to its maintenance* have been served either personally or by publication of summons. It would seem, also, that this must be done within the eight months of the statutory life of the lien, because jurisdiction of such parties, under the foregoing decisions, is an essential to any action "to enforce such lien" which is the kind of action which must be *commenced within that time* under the terms of the statute. The life of the lien, as fixed by the special statute on that subject, cannot be held to be extended for ninety days merely by the filing of a complaint within the eight months, though followed by service after the eight months but within ninety days as required by the general statute as to commencement of actions subsequently passed. No such implication is necessary, since the filing of the complaint and the service or publication of summons thereafter at any time within ninety days may both be accomplished within the eight months of the life of the lien, thus giving scope for the operation of all the provisions of the general statute, § 220, without extending the statutory life of the lien as fixed by the special statute, § 1138. Since the implication is not necessary, we cannot indulge it. It follows that personal service must be made upon, or service by publication must be commenced against, such necessary parties within eight months after the lien is filed, else the court acquires no jurisdiction to enforce the lien. We have in effect so held in *Rees v. Wilson, supra*, and *Davis v. Bartz, supra*.

An examination of the transcript as to the publication of summons, and of the court's findings as to the filing of liens, complaints, and cross-complaints, and as to service thereon,

makes it plain that the court acquired no jurisdiction within the life of their respective liens to enforce the liens claimed in favor of the respondents H. A. Hanson, City Sash & Door Company, Bass-Heuter Paint Company, D. J. McHugh, and Taylor Mill Company, or any of them. As to the complaint of H. A. Hanson, the findings disclose that there was no service of process, either actual or constructive, within eight months or at all, upon any of the parties. As to the City Sash & Door Company, no party was served with summons on either of its complaints within eight months after its lien claims were filed; and the owners of the property, the McGintys, were never served with any process. As to the complaints in intervention of Bass-Heuter Paint Company and D. J. McHugh, no process of any nature was served, either personally or by publication, upon the necessary parties, the McGintys, at any time. As to the claim of Taylor Mill Company, the findings disclose that, though the complaint in intervention was filed within eight months after the filing of the lien claim, the publication of the summons against the necessary parties, the McGintys, was not commenced until long after the expiration of the eight months. In any event, it was fatally defective. The affidavit of publication in the transcript shows that the summons as published described other property than that actually covered by the amended complaint.

It seems to have been contended in the lower court, on the authority of *Peterson v. Dillon*, *supra*, that, because of the inherent power of the court to consolidate the several actions, such consolidation gave the court jurisdiction of all parties who theretofore had appeared or had been served in either of the actions, and that, by some sort of imputed service, the appearance of the necessary parties, McGinty and wife, in the Recchio case inured as an appearance to all the other complaints and cross-complaints. The language used in the *Peterson* case, however, must be confined to the facts in that case. It can only apply where the subject-matter and issues

are identical and where the relation of the parties thereto are the same in each case, which was true of the cases there consolidated. Neither this court nor any other court, so far as we are advised, has ever held that a judgment on a complaint, cross-complaint, or complaint in intervention setting up an independent cause of action may be rendered without service on any necessary party merely because the case in which it is filed was consolidated with an action by another party on a different cause of action in which such service had been made. Such a holding would impinge the constitutional guaranty of due process of law. This court has expressly held that no jurisdiction is acquired to render judgment on a cross-complaint setting up a mechanics' lien in the absence of service of summons or copy of such cross-complaint upon the defendant, giving him a chance to plead. *Powell v. Nolan, supra.*

The decree, in so far as it establishes and forecloses the liens in favor of the respondents Hanson, City Sash & Door Company, Bass-Heuter Paint Company, McHugh, and Taylor Mill Company, is reversed, and the cause is remanded with directions to modify the decree in accordance with this opinion and dismiss their several complaints and cross-complaints in intervention. Appellants may recover their costs.

MORRIS, C. J., FULLERTON, CHADWICK, and MOUNT, JJ., concur.

[No. 13048. Department Two. April 21, 1916.]

GEORGE S. TRIGG, *Appellant*, v. CHARLES F. TIMMERMAN *et al.*, *Respondents*.[1]

WATERS AND WATER COURSES—SURFACE WATERS—DIVERSION. An upper proprietor may by means of drainage ditches conduct and hasten the flow of surface waters naturally draining into a gully, in case it does not increase the quantity of water naturally reaching the lands of a lower proprietor.

Appeal from a judgment of the superior court for Whatcom county, Brawley, J., entered March 19, 1915, upon findings in favor of the defendants, in an action for an injunction, tried to the court. Affirmed.

Frank W. Bixby, *R. J. Nightingale & Son*, and *Bixby & Nightingale*, for appellant.

Hurlbut & Neal, for respondents.

PARKER, J.—Plaintiff, George S. Trigg, seeks to have the defendants, Timmerman and wife, restrained from maintaining upon their land certain drainage ditches from which water flows upon his land. Trial of the case in the superior court for Whatcom county resulted in judgment for the defendants, from which plaintiff has appealed.

For a period of some twenty years or more, appellant has owned a farm, in Whatcom county, consisting of a square forty-acre tract, and also, in connection therewith, a right of way for road purposes over a strip of land twenty-five feet wide adjoining his farm on the north. During the same period, respondents have owned a farm consisting of two square forty-acre tracts, the easterly one of which lies immediately to the north and across this road from appellant's land. Extending northerly from a short distance north of the south boundary of appellant's land, through appellant's

[1]Reported in 156 Pac. 846.

and respondents' land and across this road, to a short distance beyond the northerly boundary of respondents' land, is a swale about five hundred feet wide, the ground rising on each side thereof from six to eight feet. This swale, in its natural condition, consists of wet, marshy ground. It slopes slightly to the south and drains naturally into a gully near the south boundary of appellant's land. There is no barrier to the flow of the water to the south in this swale, other than as the flow is impeded somewhat by the slight fall of the ground to the south and the somewhat boggy condition of the soil.

About fourteen years before the commencement of this action in the fall of 1914, appellant, with a view of improving his roadway to the north of his land, cleared and graded it across this swale, leaving a ditch on each side thereof. He, at the same time, constructed a culvert across and under the improved roadway a little east of the center of the line of the swale, for the purpose of allowing the water to flow through into an open ditch running from that point south to the head of the gully into which the swale naturally drains, which ditch had theretofore been constructed by appellant. The improvement of this roadway, had the culvert not been constructed therein, would have the effect of impeding the flow of the water to the south through the swale, somewhat as a dam, though it is possible the water might have found its way through the roadway by seepage without raising to a sufficient height to flow over it. The improvement of the roadway and the construction of the ditch running to the head of the gully enabled appellant to clear and bring into a state of good cultivation about five acres of his land lying immediately to the south of the road and, for the most part, to the west of his ditch.

Since the making of these improvements by appellant, up until October, 1914, appellant's ditch was of sufficient capacity to carry all of the water flowing through the culvert from the northerly portion of the swale, so that the water did not

interfere with the farming of his cultivated land. During a period of several years prior to six years before October, 1914, respondents, at different times, constructed and extended four or five drainage ditches upon their land which tended to hasten the flow of the water from the northerly part of the swale to the south, and through the culvert into appellant's ditch leading to the gully to the south.

In October, 1914, appellant changed his ditch, leading from the culvert to the south, from an open to a blind or underground ditch, by putting in wooden boxing and covering it with earth. This boxing, at its north end near the culvert, was placed somewhat higher than the bottom of the former open ditch. The entrance to the boxing was also sought to be protected by appellant by the use of wire screens, as he claimed, to prevent the passing into it of leaves and other material which might tend to choke it. The evidence seems to warrant the conclusion that this boxing was of sufficient size to carry all of the water coming from the north of the road even though the flow may have been somewhat hastened by respondents' ditches beyond what it naturally would be, had that end of the boxing been as low as the appellant's former open ditch and left unobstructed by screens. Soon after this change made by appellant in his ditch to an underground ditch, water overflowed his cultivated land, evidently because of the fact that it would not all flow into the boxing. This condition, appellant insists, was caused by respondents extending and deepening their main ditch just north of the culvert so as to materially increase the flow of the water, which, as he insists, caused the overflow at the head of his underground ditch near the culvert.

The trial court found, in substance, that appellant's open ditch had always been sufficient to carry all of the water coming through the culvert from respondents' land, and that the boxing of appellant's underground ditch was sufficient to carry all of the water if made low enough at its intake near the culvert and left unobstructed. We also gather from the

court's findings, though they are not very specific in that respect, that the construction of respondents' ditches upon their land, which tended to hasten the flow of water to and through the culvert, did not result in any greater quantity of water reaching appellant's land than would have reached it by nature. We think these facts are established by the evidence.

Counsel for appellant invoke the general rule that an owner of land has no right to collect surface water thereon and discharge it in a concentrated body upon the lower land of his neighbor to his neighbor's material damage. They rely particularly upon the decisions of this court in *Peters v. Lewis*, 28 Wash. 366, 68 Pac. 869; *Noyes v. Cosselman*, 29 Wash. 635, 70 Pac. 61, 92 Am. St. 937, and *Sullivan v. Johnson*, 30 Wash. 72, 70 Pac. 246. We think that a critical reading of those decisions will show that they are not applicable to the conditions here involved. The *Peters* case deals with drainage from the roofs of buildings, and also sewer drainage. The *Noyes* and *Sullivan* cases deal with drainage of surface water from land of an upper proprietor by the cutting through of a natural barrier. These conditions, we think, are distinguishable from the conditions here involved. It seems to us, in view of the nature of this swale and the fact that the water therein flows to the south to the gully unobstructed by any natural barrier other than the considerable width of the swale and its somewhat boggy condition, though it may not have had in a state of nature a well defined line along which the water flowed, that the observations of the learned editors in their note found in 19 L. R. A. (N. S.) 167, are applicable here. We there read:

"The principle very generally accepted by the courts, that the owner of higher land may not concentrate at one point surface water diffused over the surface, and discharge it in a mass upon the lower land, does not apply to natural depressions or drain ways through which the surface water on the higher land drains onto the lower land. On the contrary, it is established by the great weight of authority that the

flow of surface water along such depressions or drain ways may be hastened and incidentally increased by artificial means so long as the water is not diverted from its natural flow."

In *Manteufel v. Wetzel*, 133 Wis. 619, 114 N. W. 91, 19 L. R. A. (N. S.) 167, 170, Justice Timlin, speaking for the court, said:

"Where the upper proprietor does no more than collect in a ditch, which ditch follows the course of the usual flow of surface water, the surface water which formerly took the same course toward the land of the lower adjacent proprietor, and causes to pass through this ditch the surface water which formerly took the same course but spread out over the surface, he has committed no actionable legal wrong of which the lower proprietor can complain, or upon which such lower proprietor can maintain an action. In other words, causing surface water to flow in its natural direction through a ditch on one's own land, instead of over the surface or by percolation as formerly, where no new watershed is tapped by said ditch and no addition to the former volume of surface water is caused thereby, except the mere carrying in a ditch what formerly reached the same point on defendant's land over a wider surface by percolation through the soil, or by flowing over such wider surface, is not, when not negligently done, a wrongful or unlawful act."

Our decisions in *Hastie v. Jenkins*, 53 Wash. 21, 101 Pac. 495, and *Miller v. Eastern R. & Lumber Co.*, 84 Wash. 31, 146 Pac. 171, are in harmony with our conclusion here reached that this swale is a water course, in the sense that there is a natural gravitation of water therein towards the south, and that respondents have the right to hasten the flow of water therein, to and through the culvert constructed by appellant under his roadway, by their construction of ditches upon their land. This, we think, is specially true in view of the fact that appellant improved his roadway and constructed this culvert in such manner as to make that the only outlet for the water of the swale north of his roadway. *Schrope v. Trustees of Pioneer Township*, 111 Iowa 113, 82 N. W. 466,

and *Lambert v. Alcorn*, 144 Ill. 313, 33 N. E. 53, 21 L. R. A. 611, are in harmony with these views.

Some contention is made in appellant's behalf against the sufficiency of respondents' affirmative defense in which they also claim the right to the flow of water from their land through appellant's ditch by prescription. In view of our conclusion as to respondents' rights aside from this defense, we need not notice this contention.

The judgment is affirmed.

MAIN, HOLCOMB, and BAUSMAN, JJ., concur.

[No. 13183. Department Two. April 21, 1916.]

EILERS MUSIC HOUSE, *Respondent*, v. J. H. DOUGLASS *et al.*, *Appellants*.[1]

ELECTION OF REMEDIES—CONDITIONAL SALES CONTRACT—ACTION FOR PRICE—SUBSEQUENT DEFAULTS. The commencement of an action upon a conditional sales contract to recover installments due on the purchase price constitutes an election of remedies, treating the sale as an absolute one, and bars an action to recover possession upon forfeiture for default in making payment of subsequent installments.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered July 3, 1915, upon findings in favor of the plaintiff, in an action of replevin, tried to the court. Reversed.

Jas. J. Anderson and *Wesley Lloyd*, for appellants.

Marx & Conger, for respondent.

MAIN, J.—The purpose of this action was to recover possession of a piano. After the issues were joined, the cause was tried to the court without a jury, and resulted in a judgment in favor of the plaintiff. From this judgment, the defendants have appealed.

[1]Reported in 156 Pac. 937.

The facts are these: On September 29, 1911, Eiler's Music House, the respondent, by a conditional sale contract, sold to J. H. Douglass a Kimball piano for $359. Of the purchase price, $11 was paid in cash, and, according to the terms of the written contract, the balance was to be paid in weekly installments of $1.50 each. The contract contained the usual provisions that the title should remain in the vendor until the purchase price was fully paid, and a bill of sale given to the purchaser.

On April 26, 1912, by mutual consent of the parties to the contract, the piano first purchased was exchanged for another instrument of the same price, style, and name, differing from the first only by its serial number. No new contract was entered into, but the existing contract was considered by both parties as covering the second piano.

On May 21, 1914, the respondent commenced an action against Douglass and wife to collect the installments which had become delinquent prior to May 16, 1914. On October 30, 1914, in that action, a judgment was entered in favor of the plaintiff for $168.66. This judgment covered the installments which became due and were not paid prior to May 16, 1914.

About ten days prior to the entry of the judgment in the action mentioned, Douglass and wife executed a chattel mortgage to James J. Anderson for $125. The conditional sale contract had not been filed or recorded, as required by law, but the trial court properly found that Anderson at the time he took the mortgage had knowledge of the existence of the contract.

Subsequent to the judgment in the first action, and on November 5, 1914, the respondent commenced this action in replevin against Douglass and wife and Anderson, to recover the piano because of the failure of Douglass to pay the installments which had become due and delinquent subsequent to the institution of the first action.

The principal question presented is whether the respondent, by bringing the first action for the installments due and unpaid on the contract prior to May 16, 1914, thereby elected to treat the sale as absolute. If the bringing of that action constituted an election to treat the sale as absolute, the judgment must be reversed. On the other hand, if the bringing of such action did not constitute an election, judgment was properly rendered in this action for the respondent.

In this state, it is well settled that, under a conditional sale contract, the title to the article sold remains in the vendor, and on breach of the contract by the purchaser, the seller has a choice of remedies. He may disaffirm the contract and retake the chattel, or he may treat the transaction as an absolute sale and sue on the contract. He cannot do both; these remedies are inconsistent. To proceed by one remedy constitutes an election which is final and irrevocable. *Winton Motor Carriage Co. v. Broadway Automobile Co.*, 65 Wash. 650, 118 Pac. 817, 37 L. R. A. (N. S.) 71; *Stewart & Holmes Drug Co. v. Reed*, 74 Wash. 401, 133 Pac. 577.

In the case last cited, speaking upon this question, it was said:

"The law is well settled that where, as in this state, the title retained by the seller on a conditional sale is an absolute title, on breach of the conditional sale contract by the buyer, the seller has a choice of remedies. He may either disaffirm the contract and retake the chattel, or he may treat the transaction as an absolute sale and sue on the contract for the purchase price. But since these remedies are inconsistent, he cannot do both. The assertion of the one is an abandonment of the other. . . . Such an election once made is final and irrevocable."

It is the commencement of an action in a court having jurisdiction to enforce a coexisting inconsistent remedy which constitutes an election, and makes it binding. In *Frisch v. Wells*, 200 Mass. 429, 86 N. E. 775, 23 L. R. A. (N. S.) 144, it was said:

"It is not, however, the judgment which may be obtained, but the commencement of a suit to enforce a coexisting inconsistent remedy in a court having jurisdiction, which constitutes the decisive act and makes the election binding."

According to the doctrine of the *Stewart & Holmes Drug Co.* and *Winton Motor Carriage Co.* cases, a suit upon a contract for the purchase price constitutes an election on the part of the seller to treat the sale as an absolute one. In this case, the first action was based upon the contract for that portion of the purchase price which had become due and delinquent at the time the action was instituted. Applying the doctrine of the cases mentioned, this would constitute an election. It does not seem that there can be any difference in principle whether the action brought upon the contract is for the total balance of the purchase price, or for a portion thereof. In either case, the action is based upon the contract, and this is what constitutes the election. In the *Winton Motor Carriage Co.* case it was said:

"It seems inconceivable that the absolute title remain in the seller and at the same time the purchase price be an enforceable debt obligation against the purchaser."

A number of cases from other jurisdictions are cited sustaining the respondent's contention that the first action did not constitute an election. Without reviewing these authorities in detail, it may be said that they are either distinguishable upon their particular facts, or they are from courts which have not adopted the rule that a suit upon the contract for the purchase price necessarily constitutes an election.

The respondent has sought to distinguish the *Stewart & Holmes Drug Co.*, and *Winton Motor Carriage Co.* cases from the present case. After a careful consideration of those cases, we think the doctrine there announced is controlling here.

Our attention has been directed to the case of *Rose v. Rundall*, 86 Wash. 422, 150 Pac. 614, as sustaining the respondent's position. In that case, however, the court was dealing

with a real estate contract, and not with the sale of personal property by conditional sale contract. What was said in the opinion in that case must be read in the light of the question then before the court. The decision in that case would not be controlling in determining the effect to be given to an action upon a conditional sale contract of personal property for delinquent or unpaid installments. Whatever may be the rule in the case of real estate contracts, as already stated, this case falls within the doctrine of the cases above cited.

It follows that the judgment of the superior court must be reversed, and it is so ordered. Judgment reversed.

MORRIS, C. J., PARKER, and BAUSMAN, JJ., concur.

[No. 13189. Department Two. April 21, 1916.]

JULIUS SHAFER *et al.*, *Respondents*, v. UNITED STATES CASUALTY COMPANY, *Appellant*.[1]

INSURANCE—INDEMNITY—NOTICE—TIME—EXCUSE. Failure to give immediate notice of an accident, as required by a policy of indemnity insurance, will not avoid the policy where it was impossible to give notice until the insured had notice, which was done.

SAME—NOTICE OF LOSS—BY MAIL—EVIDENCE—SUFFICIENCY. Evidence of the mailing of letters to insured, with return address thereon, to which no reply was received and that the letters were not returned, is insufficient to establish notice, where the insured denied having received the letters.

SAME—INDEMNITY—NOTICE OF ACCIDENT—IMPUTED NOTICE — PRINCIPAL AND AGENT. Knowledge on the part of an employee through whose fault an accident happened is not imputed to the employer carrying a policy of indemnity insurance which required the insured to give "immediate" notice of an accident insured against.

APPEAL—REVIEW—THEORIES. A decision based on an erroneous theory tried *de novo* on appeal, will be sustained if correct on any theory.

[1]Reported in 156 Pac. 861.

APPEAL—REVIEW—INSUFFICIENT FINDINGS. Defective findings will not invalidate a judgment, where on trial *de novo* on appeal the evidence is found to justify the judgment.

INSURANCE—INDEMNITY—POLICY — RECOVERY — COSTS OF DEFENSE. Where an indemnity company refused the tendered defense of a personal injury case, reasonable attorney's and witnesses' fees and expenses incurred by the insured are recoverable in an action on a policy of indemnity insurance providing that all expenses in defending the suit and costs assessed against the insured shall be paid by the indemnity company.

Appeal from a judgment of the superior court for King county, Irwin, J., entered September 3, 1915, upon findings in favor of the plaintiffs, in an action on contract, tried to the court. Affirmed.

Kerr & McCord, for appellant.

Vince H. Faben, for respondents.

HOLCOMB, J.—Respondents had judgment for recovery on a policy of elevator insurance. The facts on which the same was based are, briefly, these: On November 23, 1913, appellant executed and delivered to respondents a policy of insurance, whereby it agreed to indemnify them against loss for damages on account of bodily injuries accidentally suffered by any person while entering or alighting from the elevators in a certain building in Seattle, Washington, owned by respondents, and in case of suit to defend such action and to pay expenses and costs. On May 10, 1914, while the policy was in full force and effect, one Horner was alleged to have been injured while entering one of the elevators covered by the policy. Thereafter, on about August 17, 1914, Horner commenced an action against respondents in the superior court of King county, for damages alleged to have been sustained from his injury. Respondent Julius Shafer, who had the entire control and management of the building, immediately upon the service of the summons and complaint upon respondents, took the same to one Lippman, the local

agent of appellant in Seattle, and tendered the defense of the action to appellant. This Lippman refused to undertake on the ground that notice of the accident had not been given to appellant as provided for in one of the conditions of the policy, which was as follows:

"Condition B: When any accident happens the assured shall give immediate written notice thereof to the company at its home office in New York City, or to its duly authorized agent. If any claim is made on account of such accident, the assured shall give like notice thereof. . . . That assured shall always give the company all cooperation and assistance possible. The company shall have the right to settle any claim or suit at its own cost at any time."

It was contended by appellant that, by reason of this delay to give notice as provided in the policy, the elevator pilot who operated the elevator at the time of the alleged accident could not be located by appellant, after a diligent search, so he could be used as a witness at the trial. Respondents retained counsel, and the case proceeded to trial, and judgment was entered against respondents in the sum of $200, and costs were taxed in the sum of $41.40. Meantime the elevator pilot had been located by respondents, and testified in their behalf. Respondents paid the judgment amounting to $241.40, and also the further sum of $323.80 for attorney's fees and reporter's and witness fees, which were necessary, so far as the record discloses, in properly defending the action; and instituted the present action against appellant to recover the amount so paid out, alleging a breach of the terms of the insurance policy by reason of appellant's failing to defend the action. Appellant answered and sought to escape liability on the ground that written notice had not been given as provided in the policy above set out, and that, by reason thereof, it was not able to locate the principal witness, viz., the elevator pilot. Trial was had to the court without a jury, and the court made and entered findings of fact and conclusions of law against appellant, and rendered judg-

ment in the sum of $565.65, with interest and costs; from which this appeal comes.

From a memorandum opinion of the trial court filed in the case, we find that his decision was based on the ground that, since the elevator pilot was located and testified at the trial on behalf of the respondents, the delay in giving notice did not contribute to the loss, and so the breach of this condition could not relieve appellant from liability, as provided in 3 Rem. & Bal. Code, § 6059-34, which reads, in part, as follows:

"The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss."

The court being of this opinion, did not make a finding on the question of whether respondents had notice of the injury prior to the time when they were served with process in the Horner action, the evidence on this point being conflicting. The determination of this question lies at the very threshold of this appeal and, from the view we take of the point, it is determinative of the action; as the rule is well settled that where, because of the circumstances and conditions surrounding the transaction, the giving of notice within the time specified becomes impossible, it will be excused and held sufficient if given within a reasonable time after the removal of the obstacle. *Hilmer v. Western Travelers' Acc. Ass'n*, 86 Neb. 285, 125 N. W. 535, 27 L. R. A. (N. S.) 319; *Jennings v. Brotherhood Acc. Co.*, 44 Colo. 68, 96 Pac. 982, 130 Am. St. 109, 18 L. R. A. (N. S.) 109; *United States Casualty Co. v. Hanson*, 20 Colo. App. 393, 79 Pac. 176.

In *Edgefield Mfg. Co. v. Maryland Casualty Co.*, 78 S. C. 73, 58 S. E. 969, the court held that, where plaintiff was insured against accidents to its employees and the policy provided for immediate notice of accident to insurer, notice of accident was excused where the superintendent was sick and most of the office force were quarantined with the small-

pox; since notice of the accident was given as soon as the new superintendent found the policy of insurance. In *Crystal Ice Co. v. United Surety Co.*, 159 Mich. 102, 123 N. W. 619, the court held that proof of actual notice to the agent of defendants of an employee's defalcation as soon as discovered and a letter two days later acknowledging receipt of such notice is timely notice of defalcation. In *Hope Spoke Co. v. Maryland Casualty Co.*, 102 Ark. 1, 143 S. W. 85, Ann. Cas. 1914 A. 268, 38 L. R. A. (N. S.) 62, the court held that, where plaintiff was insured for accidents to his employees and upon the happening of an accident gave notice to a wrong company and as soon as he found out his mistake gave notice to the right company, the failure to give immediate notice would not absolve the insurer from liability, for unless the contract makes the giving of the notice a condition precedent to recovery or the essence of the contract, failure to give notice within a specified time does not operate as a forfeiture. This case also distinguishes the case of *Deer Trail Consol. Min. Co. v. Maryland Casualty Co.*, 36 Wash. 46, 78 Pac. 135, 67 L. R. A. 275, in that, in the *Deer Trail* case, the policy, by express terms, made the giving of the notice a condition precedent to recovery. In our present case, the terms of the policy do not make the giving of the notice either a condition precedent to recovery or of the essence of the contract.

"Where the policy contains a stipulation that, in order to entitle the insured or his beneficiary to recover thereunder, a notice of the accident or injury, containing full particulars thereof, must be furnished the insurer within a certain time, such stipulation is valid and must be complied with before a recovery can be had on the policy, except where not made a condition precedent to such right of recovery or where impossible of performance." 1 Cyc. 274.

There is no direct evidence in the record that either of the respondents had notice of the accident prior to the institution of the Horner action, except that Lippman testified that, in

a conversation with respondent Julius Shafer, the latter told him that he (Shafer) knew of the accident but thought it was so trivial as to be of no consequence. This was positively denied by Julius Shafer. Horner testified that he sent two letters concerning the accident, with his return address thereon, directed to the manager of the Mutual Life building, and received no reply, and that the letters were not returned. Respondent Julius Shafer denied having received either of these letters; and this notice was insufficient under the holding of this court in the case of *Gibson v. Rouse*, 81 Wash. 102, 142 Pac. 464. Horner also testified that he went to one Hartley in the building where the accident occurred immediately after the accident and there notified him of it. It appears, however, that Hartley was merely a tenant in the Mutual Life building, and was the agent of the respondents only in a limited sense of collecting rents from tenants whom he procured, and received his office rent therefor. Hartley denied notice and testified that he had never seen Horner before. It appears that Horner never gave either of the respondents personal notice of the accident, though he knew that they owned the building, and passed the place where they transacted their merchandise business, several blocks distant from the Mutual Life building, frequently. Julius Shafer, who attended to all the business concerning the Mutual Life building, stated without reservation that he never had notice of the accident until the process was served on him in the Horner action. Viewing these facts as a whole, we think respondents have sustained their contention that they never had notice of the injury prior to the time the Horner action was instituted against them, and that it was impossible for them to give notice of the accident until they had notice of it; that they were relieved of the necessity of giving notice to appellant.

Nor do we think that knowledge of the accident by the elevator pilot is to be imputed to the respondents. The rule on this question is aptly expressed in the case of *Mandell v. Fidelity & Casualty Co.*, 170 Mass. 173, 49 N. E. 110, 64

Am. St. 291, which holds that knowledge of an accident to a teamster is not imputed to his employer, and that all the employer was bound to do was to exercise ordinary diligence in adopting such measures as would lead to knowledge on his part of the occurrence of accidents. Upon this question, respondents testified that they told their employees to notify them immediately of any accidents occurring in the Mutual Life building. In *Woolverton v. Fidelity & C. Co.*, 190 N. Y. 41, 82 N. E. 745, 16 L. R. A. (N. S.) 400, the court holds that knowledge of the servants of a corporation, insured against the injuries caused by its horses or vehicles, by whose fault an injury is caused, is not imputed to the corporation so as to bring into operation a provision of the policy requiring immediate notice to the insurer in case of accident.

It is true the court below decided the case on a different theory; but since the case is triable *de novo* in this court, a decision correct upon any theory will be sustained in the appellate court, although the theory of the trial court may have been erroneous. *Kanton v. Kelly*, 65 Wash. 614, 118 Pac. 890; *Kane v. Dawson*, 52 Wash. 411, 100 Pac. 837; *Hartig v. Seattle*, 53 Wash. 432, 102 Pac. 408.

Nor do we consider the fact that the trial court failed to make a finding as to whether or not respondents had notice of the accident prior to the time of the institution of the Horner suit fatal to the judgment, based on the grounds expressed in this opinion; as every necessary fact not expressly negatived will be presumed, and the insufficiency of the findings of fact is immaterial where the evidence justifies the judgment, and merely defective findings will not invalidate it. *Blair v. Wilkeson Coal & Coke Co.*, 54 Wash. 334, 103 Pac. 18; *Magee v. Risley*, 82 Wash. 178, 143 Pac. 1088; *Cook v. Oregon-Washington Corporation*, 84 Wash. 68, 146 Pac. 156, 149 Pac. 325.

Appellant next contends that, in any event, the sums for reporters, lawyers, and expert witnesses' fees, aggregating

$323.80, are not items chargeable against it; but, since this is a contract of indemnity against loss, and condition B of the policy provides that all expenses, legal or otherwise, incurred by the company in defending such suit and all costs assessed against the insured shall be paid by the company, etc., it was, therefore, the duty of the respondents to take all reasonable means to reduce the recovery to a just sum if the appellant, as it did here, refused to defend the action. But since there is no contention that these sums are unreasonable, we think they were properly charged to appellant. Other contentions urged by appellant we consider unnecessary to notice, owing to the views expressed herein.

The judgment is affirmed.

MAIN, PARKER, and BAUSMAN, JJ., concur.

[No. 13210. Department Two. April 21, 1916.]

M. CHURCHILL, *Respondent*, v. WILLIAM MILLER, *Sheriff of Stevens County, et al., Appellants.*[1]

HUSBAND AND WIFE—COMMUNITY DEBT—JOINT NOTE—LIABILITY OF WIFE. A note signed by husband and wife reciting that "I or we promise to pay" etc., being a joint and several note under Rem. & Bal. Code, § 3408, subd. 7, binds the separate and community property of both husband and wife, although given for a community debt.

FRAUDULENT CONVEYANCES — VALIDITY — CHANGE OF POSSESSION. Under Rem. & Bal. Code, § 5291, providing that no bill of sale of personal property shall be valid as against existing creditors, where the property is left in the possession of the vendor, unless the bill of sale is recorded, etc., there was no change of possession of a piano and other goods, left by the vendors for two years in a room reserved for storage upon renting their house, where the tenant had no possession or control of the goods, and the only act of the vendee in taking possession was to notify the tenant that he had bought the piano.

PLEDGES—VALIDITY—CHANGE OF POSSESSION. In order to pledge personal property for security of a debt there must be either a change

[1]Reported in 156 Pac. 851.

of possession or some instrument of record to evidence a constructive change of possession.

FRAUDULENT CONVEYANCES — VALIDITY — CHANGE OF POSSESSION. The giving of a bill of sale which was not recorded as required by Rem. & Bal. Code, § 5291, together with notice by the vendee to a third person not having possession, is not a sufficient change of possession to pass title.

EXEMPTIONS — NONRESIDENTS — STATUTES. Nonresidents cannot claim exemptions from execution, in view of Rem. & Bal. Code, § 571, to the effect that the statute relating to exemptions from execution or attachment shall not be construed to exempt property of nonresidents.

Appeal from a judgment of the superior court for Stevens county, Jackson, J., entered June 30, 1915, upon findings in favor of the plaintiff, in an action of claim and delivery, tried to the court. Reversed.

Carey & Johnson, for appellants.

L. C. Jesseph, for respondent.

HOLCOMB, J.—On March 1, 1915, appellant Miller, as sheriff of Stevens county, by virtue of an execution for a deficiency under a personal judgment, issued to him upon a judgment in favor of appellant Lindsey and against Alma Kingsley Norton and George H. Norton, wife and husband, levied upon and seized one pianola piano, a box of oil paintings, one velvet carpet, and other personal property, as the property of the judgment debtors, and advertised to sell the same, under the judgment and execution, on March 11, 1915. Thereupon, on March 4, 1915, respondent filed the affidavit and bond required by Rem. & Bal. Code, §§ 573 to 577 (P. C. 81 §§ 891-899), and claimed and took possession of the pianola piano, oil paintings and velvet carpet which had been levied upon. Trial was had to the court without a jury and, after a hearing on evidence, the court entered a decree awarding the paintings and the carpet and 7-15 of the piano pianola to the respondent, and 8-15 of the piano pianola the court decided was subject to levy and sale.

Appellant Lindsey obtained a judgment against the Nortons on January 28, 1915, for a sum exceeding $2,400. This judgment was based upon a note and mortgage given by Mrs. Kingsley and her husband, by her as his attorney-in-fact. The note which the mortgage was given to secure, and upon which the judgment was based, was a joint and several note, reading, in part, as follows: "On or before five years after date, without grace, I or we promise to pay," etc. Such a note, under our statute, Rem. & Bal. Code, § 3408, subd. 7 (P. C. 357 § 33), is a joint and several note of the husband and the wife and, although for a community debt, binds the community and the separate estates of the husband and wife, whether the wife signed as maker or indorser, in view of the removal of the common-law disabilities of wives to bind their separate estates. *Northern Bank & Trust Co. v. Graves*, 79 Wash. 411, 140 Pac. 328; *Lumbermen's Nat. Bank v. Gross*, 37 Wash. 18, 79 Pac. 470. In this case, Mrs. Norton signed the note as a principal, and there can be no doubt as to her separate liability upon it. That being the case, the judgment would affect her separate and individual property, as well as her community property and the community or separate property of her husband. The property mortgaged to secure the note was sold under the judgment and foreclosure, leaving a deficiency on the judgment of something over $1,400, for which the execution was issued against the personal property in question.

At the trial, respondent introduced a bill of sale of the property claimed, made and executed in Vancouver, B. C., on February 8, 1915, signed only by A. Kingsley Norton, wife of George H. Norton. The bill of sale was never recorded as required by Rem. & Bal. Code, § 5291 (P. C. 203 § 7). It is contended by respondent that, though the bill of sale was not recorded so as to comply with the statute, possession was taken by respondent prior to the seizure under the execution. This is the principal question in the case: whether or not there was any change of possession from the

Nortons to respondent. The facts in the case show that the property had long been situated in a house belonging to the Nortons, or Mrs. Norton, at Kettle Falls, Stevens county, Washington, where the Nortons formerly lived; and that, about two years previous to the alleged transfer, the Nortons had removed to British Columbia, had rented their house in Kettle Falls, and retained one room therein for storage purposes, where this property was stored. It remained there all the time until seized by the sheriff under the execution. The name of the tenant of the Nortons was Williams. Respondent testified as to how he took possession as follows: "I have taken possession of the property by telling Mr. Williams that I had bought the piano. I do not think I mentioned the other property in the bill of sale." Mr. Williams testified that the goods, and all of them, had been left in his possession, and that respondent had never taken charge of them except by word and direction; that, on the 9th or 10th of February, respondent spoke to him relative to the piano; that he made no statement relative to the other goods at all. Williams further testified that he never at any time exercised any dominion over any of this property as agent, either for Mrs. Norton or for respondent. His possession must be construed, in the light of the facts, as being only a sort of general custody from having possession as tenant of the premises where the property was situated. But from these chattels and the room in which they were contained, he was excluded. He was, therefore, not a bailee.

Respondent makes some contention that the property was pledged to him two years before the levy of the execution, and was taken into his possession at that time, and was therefore not subject to sale. This cannot be sustained, for the reason that, at that time, there was neither actual nor symbolic delivery of possession to him under a pledge or in any other wise. If he had the property pledged to him for the security of a debt, there should have been either a change

of possession or some instrument placed of record to evidence the constructive change of possession. There was none.

It is next contended that the giving of the bill of sale by Mrs. Norton to respondent transferred the title to the property to him, and the possession he took of the property was a sufficient compliance with the statutes. It was held in *Sayward v. Nunan*, 6 Wash. 87, 32 Pac. 1022, a proceeding to foreclose an unrecorded chattel mortgage, that, where actual possession was not delivered, mere inspection and words between the mortgagor and the person in possession would not constitute a change of possession, especially such an open and notorious change of possession as is required in such a case; citing *Steele v. Benham*, 84 N. Y. 634, and *Siedenbach v. Riley*, 111 N. Y. 560, 19 N. E. 275. In *Steele v. Benham*, it was held that, to satisfy the statute, the possession must be actual, not merely constructive or legal; that actual and continued change of possession in the statutes means an open, public change of possession which is to continue and be manifestly continual by outward and visible signs such as render it evident that the possession of the judgment debtor has ceased. In *Crandall v. Brown*, 18 Hun 461, it was said that constructive possession cannot be taken under a chattel mortgage; that possession must be taken in fact, and that possession cannot be taken by words and inspection.

Under our statute, constructive possession could have been delivered by the recordation according to law of the bill of sale, or its symbolic transfer of title. No key giving the vendee exclusive access to the room and exclusive control of the goods was delivered to him. *Boothby & Co. v. Brown*, 40 Iowa 104. No such constructive possession of goods capable of being transferred actually and openly, as is here shown, satisfies the law. *Knox v. Fuller*, 23 Wash. 34, 62 Pac. 131, is cited as sustaining such constructive delivery of possession. That was a case involving only the question of whether and when title and possession passed as between the

parties. It was there held that the purchasers were given an independent key to a warehouse containing goods, and took the goods as they desired to use them, indiscriminately, from the entire shipment; that such acts constituted delivery and taking of possession and title in the purchaser. *Chezum v. Parker*, 19 Wash. 645, 54 Pac. 22, is cited also as sustaining a constructive delivery. In that case the question was, in the first place, whether or not there had been any transfer as between the plaintiff and his alleged vendor. It was held that there had been sufficient words and conduct on the part of his vendor to indicate a transfer of title; and in the second place, that the plaintiff took actual possession and control of the property. The cases are not in point here.

35 Cyc. 311, 312, is cited to the effect that the general rule is that the delivery must consist of an actual and continuous transfer of property. This rule must be applied, however, in view of the character and situation of the property and circumstances. Although such possession as a purchaser can reasonably take must be taken, it is not essential, as against creditors and subsequent purchasers, that there should be in all cases an actual manual delivery or a change of possession at the time of the sale, or immediately; citing also 5 R. C. L. 397. The rule is stated in 35 Cyc. 312, as follows:

"It has been held that it is sufficient as against creditors and subsequent purchasers if notice of the sale is given to the third person in possession, unless his possession is of such a character that it does not convey any notice to the world of the change of ownership, . . ."

In this case, it must be remembered that Williams, the tenant of the Nortons, had no control over this property and had never exercised or pretended to have any control. He was merely the tenant of the Nortons of their real estate and building, with the exception of one room which had been reserved by Mrs. Norton and in which this property was contained. The chattels in the reserved room were wholly in

the possession of the Nortons. They had been located in that place for two years in the same condition. The notice to Williams as a third person in charge of the property was, therefore, not a taking of possession. The property remained in the possession of the seller as much after such notice as it had been continuously theretofore. There was no change of possession. It was to prevent exactly such equivocal possession that the recording within ten days of the written transfer of title, or else actual transfer of possession, is required by law.

Whether the property was the community or the separate property of Mrs. Norton makes no difference in this case, for she is liable, both upon her community and her separate property, under our holding in *Northern Bank & Trust Co. v. Graves*, *supra*, and the statute heretofore cited.

There is some contention that, at any rate, the property could not be levied upon for the reason that it is exempt. This is answered by reference to Rem. & Bal. Code, § 571 (P. C. 81 § 887), to the effect that the statute relating to exemptions shall not be construed to exempt from execution or attachment the property, real or personal, of nonresidents. These parties were nonresidents at the time of the seizure, and had been for two years.

The judgment is reversed, and the cause remanded with instructions to enter judgment in favor of appellant, with costs.

MORRIS, C. J., MAIN, PARKER, and BAUSMAN, JJ., concur.

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Harmless error in evidence, see EXPLOSIVES.
Review of assessments, see MUNICIPAL CORPORATIONS, 6-8.

14. APPEAL—REVIEW—CHANGE OF THEORY—POINTS NOT MADE BELOW. In a proceeding to share in an estate as a daughter of the deceased, in which the claimant elected to stand upon the claim that she was a natural daughter, tried throughout on that issue, and disclaiming an adoption, it cannot be claimed on appeal that she was shown to be an adopted daughter. *In re Lind's Estate*..... 10

15. SAME—REVIEW—QUESTIONS PRESENTED. Exceptions to the admission of evidence cannot cure the failure to except to findings based thereon, which failure waives exceptions to the admission of evidence. *Kitsap County Bank v. United States Fidelity & Guaranty Co.* 12

17. APPEAL—REVIEW—RECORD BELOW—INSTRUCTIONS—BILL OF PARTICULARS. Upon a case coming up on a bill of exceptions that includes only the pleadings and the instructions, a bill of particulars cannot amplify the complaint or be considered as proof, to start a presumption against the instructions. *Nilsen v. Ebey Land Co*..... 295

18. APPEAL—REVIEW—THEORY OF CASE. Where a bank undertakes to foreclose a deed, given to a trustee, as a mortgage securing its debt, it is estopped to claim on appeal that the deed was absolute and has not been overcome by clear and certain proof; as a case cannot be tried on a new theory first advanced on appeal. *Belcher v. Young* 303

19. APPEAL—REVIEW—INSUFFICIENT FINDINGS. Defective findings will not invalidate a judgment, where on trial *de novo* on appeal the evidence is found to justify the judgment. *Shafer v. United States Casualty Co.* 687

20. APPEAL—REVIEW—THEORIES. A decision based on an erroneous theory tried *de novo* on appeal, will be sustained if correct on any theory. *Shafer v. United States Casualty Co*..... 687

21. APPEAL—REVIEW—AMENDMENTS. Where evidence admitted without objection justifies a trial amendment, the complaint will, on appeal, be deemed amended to conform to the proof. *Scribner v. Palmer* 595

22. APPEAL—REVIEW—GRANT OF NEW TRIAL—DISCRETION. An order granting a new trial on general grounds cannot be set aside on appeal where the court may have properly exercised its discretion on the point of the sufficiency of the evidence, which was conflicting. *Pappas v. Dailey*..... 285

23. APPEAL—REVIEW—FINDINGS. A finding on directly contradictory statements will be sustained on appeal. *Carstens Packing Co. v. Lewis C. Troughton, Incorporated*..... 196

APPEAL AND ERROR—CONTINUED.

24. APPEAL—REVIEW—FINDINGS. Findings on conflicting evidence will not be disturbed where supported by disinterested evidence as against opposing interested testimony. *Kennedy v. Meilicke Calculator Co.* 238

25. APPEAL—REVIEW—FINDINGS. Findings of the trial court on conflicting evidence will be sustained where it cannot be said that they are not sustained by a preponderance of the evidence. *Bernheimer v. Rezek* 386

26. APPEAL—REVIEW—FINDINGS. Findings upon conflicting and evenly balanced oral testimony will not be disturbed on appeal. *Vulcan Manufacturing Co. v. Pacific Sea Products Co* 439

27. APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence, where the trial court heard and saw the witnesses, will not be disturbed on appeal, where the evidence does not preponderate against them. *Barr v. Kerfoot Investment Co* 471

28. APPEAL—REVIEW—FINDINGS. Findings will not be disturbed unless it can be said that they are not sustained by the preponderance of the evidence. *Anderson v. Hassell* 485

29. APPEAL—REVIEW—FINDINGS. In the absence of a preponderance of evidence against the findings, they will not be disturbed on appeal. *Falco v. Blodgett* 519

30. APPEAL—REVIEW—FINDINGS. A finding on conflicting evidence will not be disturbed where the evidence does not preponderate against it. *Brown v. Ehlinger* 585

31. APPEAL—REVIEW—VERDICT. The supreme court will not disturb a verdict as excessive, where the trial court refused to disturb it, and the court is not satisfied that it is excessive. *O'Meara v. Russell* 557

32. APPEAL—REVIEW—HARMLESS ERROR. Upon a trial *de novo* on appeal, errors in the admission of evidence are immaterial. *Evans v. Goist* 100

33. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. In a prosecution for abortion, it is not reversible error to exclude cross-examination of the complaining witness as to her voluntary fault to affect her credibility, where she had already admitted voluntary intercourse with this and other men. *State v. Russell* 474

34. APPEAL—REVIEW—HARMLESS ERROR. Error in the admission of evidence of a mortgage is not prejudicial when the existence of the mortgage was admitted. *Scribner v. Palmer* 595

35. APPEAL—REVIEW—INSTRUCTIONS. Error cannot be predicated on the refusal to give instructions that are covered in the general charge. *Mott Iron Works v. Metropolitan Bank* 655

APPEAL AND ERROR—CONTINUED.

36. APPEAL—REVIEW—DECISION—LAW OF CASE. A decision as to the sufficiency of the evidence upon a former appeal becomes the law of the case, and conclusive upon a second appeal where the evidence was the same in all material particulars. *Scribner v. Palmer*... 595

37. APPEAL—REVIEW—DECISION—LAW OF CASE. Where there is no material change in the evidence, a decision as to its sufficiency on a former appeal becomes the law of the case and conclusive on a second appeal. *Mott Iron Works v. Metropolitan Bank*..... 655

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Of tax, see TAXATION, 1, 2.

ARBITRATION AND AWARD:

1. ARBITRATION AND AWARD—CONTRACT — CERTAINTY — ENFORCEMENT. Under the rule that courts will not enforce contracts for arbitration where the intention is left in doubt, an agreement to arbitrate is not sufficiently clear to warrant enforcement, where, upon a sale of 1,500 boxes of first grade New Zealand butter, to be forwarded in five monthly shipments, the third shipment was found largely off grade and, the fifth shipment only remaining, the seller telegraphed offering to arbitrate in the event of the butter being off grade owing to keeping too long or improper handling, and the buyer replied requiring guaranty of payment in full at once for butter rejected by arbitrators, stating a preference to await arrival of butter and pay for that accepted, but finally did put up a letter of credit on receiving seller's reply "we agree to pay difference arbitrators decide on butter"; since it did not sufficiently appear what was to be arbitrated. *Klock Produce Co. v. Robertson*..... 260

ARGUMENT OF COUNSEL:

In criminal prosecutions, see CRIMINAL LAW, 4.
In civil actions, see TRIAL, 6.

ARREST:

Illegal arrest, see FALSE IMPRISONMENT.

ASSAULT AND BATTERY:

On passenger, see CARRIERS, 3, 4.

1. ASSAULT AND BATTERY—EVIDENCE—SUFFICIENCY. A verdict for an assault and battery is sustained by evidence of an affray engaged in by defendant's servant who was encouraged and assisted by the defendant. *Casady v. Anderson*..... 296

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2. SAME—PERSONAL INJURIES—DAMAGES—EXCESSIVE VERDICT. A verdict of $750 for an assault and battery is not excessive, where the defendant suffered a broken rib, a broken ear-drum, several other bruises and considerable pain with loss of sleep and loss of time for a period of two months. *Casady v. Anderson*..... 296

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Of compensation for property taken or injured for public use, see EMINENT DOMAIN.
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Of expenses of public improvements, see MUNICIPAL CORPORATIONS, 4-11.
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Duties of, see TAXATION, 8-11.

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Abatement of, see CONSTITUTIONAL LAW, 9.

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By contractor on public works, see PRINCIPAL AND SURETY, 2, 3.

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Of risk by employee, see MASTER AND SERVANT.

ATTORNEY AND CLIENT:

Unethical conduct, see CONSPIRACY.
Argument and conduct of counsel at trial in criminal prosecution, see CRIMINAL LAW, 4.
Employment by husband, see HUSBAND AND WIFE, 1.
Fees, as item of recovery, see INJUNCTION, 1, 6; INSURANCE, 11.
Warrant to confess judgment, see JUDGMENT, 13, 14.
Argument and conduct of counsel at trial in civil actions, see TRIAL, 6.

1. ATTORNEY AND CLIENT—COMPENSATION—PERFORMANCE OF CONTRACT—EVIDENCE—SUFFICIENCY. The dismissal of an action to recover an attorney's fee of 25 per cent of the amount recovered by any suit or compromise of the client's claims is unwarranted, where the evidence is undisputed that the attorney, after having commenced an action which was abandoned, joined in another action respecting a mortgage and an accounting due from his client, and by joining in opposing the adverse interests, accomplished the same result as by a direct suit, recovering $5,644.45 in cash and a third interest in certain lands; and it is immaterial that such cash was all consumed in paying an indebtedness of the client which was an entirely independent transaction. *Thomas v. Scougale*..... 162

AUTHORITY:

Of corporate officers or agents, see CORPORATIONS, 1-3.
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See CARRIERS, 5, 6.
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AWARD:

See ARBITRATION AND AWARD.

BAIL:

1. BAIL—FORFEITURE—INSUFFICIENT INFORMATION. A bail bond given on a criminal charge cannot be forfeited for nonappearance of the accused where the information was insufficient. *State v. Bryant* 20

BAILMENT:

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BANKS AND BANKING:

Evidence of deposit, see EVIDENCE, 5.

1. BANKS AND BANKING—DEPOSITS—"FOR COLLECTION"—ACTIONS—EVIDENCE. A printed declaration at the foot of a deposit slip that the bank takes the check for collection and only as agent of the customer is some evidence of that fact, although credit was given and the customer was allowed to check against the deposit. *American Savings Bank & Trust Co. v. Dennis* 547

2. SAME—DEPOSITS FOR COLLECTION—CHECKS—TITLE. Where a check is deposited with the understanding that, if the bank fails to collect it, the amount is to be charged back, the check remains the property of the depositor, and allowing him to check against it is a mere gratuitous privilege. *American Savings Bank & Trust Co. v. Dennis* 547

3. BANKS AND BANKING—DEPOSITS—"FOR COLLECTION"—ACTIONS—CUSTOM AND USAGE—EVIDENCE—ADMISSIBILITY. In an action upon a check, upon an issue as to whether it was taken for deposit or only for collection as agent of the customer, the bank is not entitled to show its custom or rule in dealing with other customers in such cases, where the customer in question was not aware of any such custom or rule of the bank. *American Savings Bank & Trust Co. v. Dennis* 547

BAR:

Of action by former adjudication, see JUDGMENT, 4-10.
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BASTARDS:

As "child," see EXEMPTIONS, 1.

1. BASTARDS—INHERITANCE—RIGHT. Under the common law an illegitimate child could not take as an heir, and the right to do so must rest upon statute, such statute being remedial only in the sense of giving the beneficiary a status in law. *Wasmund v. Wasmund* 274

2. SAME—INHERITANCE—COMMUNITY PROPERTY—STATUTES. Upon the death of the wife, her illegitimate child does not inherit one-half of the community property by virtue of the act of 1875, § 4 (Rem. & Bal. Code, § 1345) providing that every illegitimate child "shall in all cases be considered an heir to the mother" and shall inherit the estate in the same manner as if he had been born in lawful wedlock; in view of § 2 of the same act, which provides that on the death of one spouse, the community property should vest in the survivor, and the later enactment, Laws 1879 (Rem. & Bal. Code, § 1342) which provides for the descent of one-half of the community property in equal shares to the "legitimate issue" of the body of the deceased, and if there be no issue living then the same "shall all pass to the survivor;" since the history of the act shows the intent to exclude illegitimate issue from sharing in the community property, except by testamentary disposition or acknowledgment or adoption of the child, which was within the power of the parent to provide. *Wasmund v. Wasmund*..... 274

BATTERY:

See ASSAULT AND BATTERY.

BENEFITS:

Acceptance of, as ground of estoppel, see ESTOPPEL.
Assessment of, conclusiveness, see JUDGMENT, 8-10.
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BEST AND SECONDARY EVIDENCE:

In civil actions, see EVIDENCE, 5-11.

BIDS:

Fraud in letting contract, see HIGHWAYS, 1.

BILL OF EXCHANGE:

See BILLS AND NOTES.

BILL OF PARTICULARS:

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BILLS AND NOTES:

Joint note by husband and wife, effect, see HUSBAND AND WIFE, 5.
Computation of period of limitations, see LIMITATION OF ACTIONS.
Negotiable receipts, see WAREHOUSEMEN.

1. BILLS AND NOTES — ACCEPTANCE — CONDITIONS — CONSTRUCTION — "AVAILABLE." Upon an acceptance of a bill of exchange, "payable out of proceeds of N. W. Fisheries Co. contract when same becomes available," the acceptor cannot, to the prejudice of the holder, apply proceeds subsequently received to discharge indebtedness owing the acceptor before the acceptance; since "available" means "at one's disposal," and the use of general terms in an acceptance without expressing any condition will not exempt from liability through particular facts which have already happened. *Schwabacher Hardware Co. v. Miller Sawmill Co*..... 193

2. BILLS AND NOTES—LIABILITY OF INDORSER. Under Rem. & Bal. Code, § 3457, an indorsement in blank implies a promise to pay the note according to its purport, but only upon demand and notice. *Bardshar v. Chaffee*..... 404

3. SAME—INDORSEMENT—LIABILITY—NOTICE OF DISHONOR. An option in a mortgage note to declare the whole sum due upon default in payment of interest does not dispense with the necessity for presentment and demand upon the maker and notice of dishonor in order to hold an indorser; and the fact that the maker had defaulted in interest at the time it was negotiated is immaterial and does not make it demand paper. *Bardshar v. Chaffee*..... 404

BLASTING:

City license for, evidence, see EXPLOSIVES.

BOOM COMPANIES:

Condemning property of, see EMINENT DOMAIN, 1.

BONA FIDE PURCHASER:

Of property fraudulently conveyed, see FRAUDULENT CONVEYANCES, 2.
Good faith, between husband and wife, see HUSBAND AND WIFE, 3, 4.
Who are, see MORTGAGES, 3.
Of lands, see VENDOR AND PURCHASER, 1.

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See BAIL; INJUNCTION.
Of jitney drivers, see CARRIERS, 5, 6.
Municipal bonds, see MUNICIPAL CORPORATIONS, 13.
On public work, see PRINCIPAL AND SURETY.
Of contractors, in lieu of liens, see RAILROADS, 1-3.

BREACH:

Of condition, see INSURANCE, 5-7.
Of contract for sale of land, see VENDOR AND PURCHASER.

BREACH OF MARRIAGE PROMISE:

Promisee, when a "creditor," see FRAUDULENT CONVEYANCES, 4.
Instructions as to liability, see TRIAL, 9.

1. BREACH OF MARRIAGE PROMISE—ACTIONS—ACCRUAL. A promise to marry at a future time is breached immediately upon defendant's informing the plaintiff that he would never marry her. *Johnson v. Blomdahl* 625

2. BREACH OF MARRIAGE PROMISE — EVIDENCE — SUFFICIENCY. A verdict for $4,000 for breach of marriage promise is not unsupported by the evidence in that it appeared that the plaintiff was afflicted with maladies at the time of the engagement justifying the breach, where there was evidence that she was completely cured by an operation before the time for performance. *Travis v. Schnebly*.. 463

BRIBERY:

Charge of, see LIBEL AND SLANDER.

BROKERS:

See FACTORS.
Joinder of causes of action for commissions, see ACTIONS, 2.
Custom, evidence of, see CUSTOM AND USAGE.
Contract for commissions, see PARTNERSHIP.
Contract as cloud on title, see RECORDS.

1. BROKERS—ACTIONS FOR COMMISSIONS—INSTRUCTIONS. In an action to recover a broker's commission for negotiating a purchase of stock, an instruction to the effect that a broker engages to obtain for his employer the contract which he was authorized to submit, is not prejudicially erroneous, when considered as a whole in connection with other parts fully and fairly setting forth the duty of the broker merely to induce the owner of the stock to consent to enter into the contract, such owner being ready, able and willing to carry out the contract. *Calhoun, Denny & Ewing v. Whitcomb*..... 128

2. SAME. In an action to recover a broker's commission for negotiating a purchase of stock, which defendant claimed was dependent upon converting other common stock held by defendant as trustee into preferred stock, so that the contract took advantage of defendant's trust position for his personal benefit and was void as against public policy, an instruction as to its invalidity for that reason is not prejudicially erroneous, when considered in connection with other instructions as to the presumption of honesty of action in such a case, and that the broker would nevertheless be entitled to his commissions, regardless of whether the parties contemplated a violation of law or the commission of a fraud, unless he knowingly participated in some way in the illegality or fraud. *Calhoun, Denny & Ewing v. Whitcomb*..... 128

3. SAME—INSTRUCTIONS—COMMENT ON EVIDENCE. In an action to re-

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cover a broker's commission for negotiating a purchase of stock, an instruction calling attention to the particular features of the case, and to the particular phases to be determined as to the probability or improbability of the truth of the evidence, cannot be said to be unfair comment on the evidence such as is prohibited by the constitution, or an argument in favor of either party, where it takes cognizance of the theories of both parties, and is more favorable to the appellant than the respondent. *Calhoun, Denny & Ewing v. Whitcomb* 128

4. SAME. In such an action, where the oral agreement to pay the broker's commissions was dependent upon the proposed contract to purchase the stock, a written memorandum of which was drawn up but not executed, being called a tentative agreement, and the purchase was part of the broker's contract of employment, it is not error for the court to instruct the jury that, unless the negotiations between the parties did result in an actual present agreement, as distinguished from a proposed proposition to be considered in the future, the defendant was not liable; especially where another part of the instruction relating to the necessity of a meeting of the minds of the parties showed clearly that the instruction as a whole related to the oral contract of employment of the plaintiff and properly submitted a disputed question of fact as to whether the things said constituted the agreement, or merely resulted in the giving of a writing which was to form the basis of a future agreement. *Calhoun, Denny & Ewing v. Whitcomb*..... 128

5. BROKERS—COMMISSIONS—CONTRACT — BREACH — LIABILITY. Where both parties agreed to unite in paying a broker's commission, upon the execution of papers effecting an exchange of properties, which was prevented solely by the default of one of the parties, such party is liable for the entire commissions. *Littlefield v. Bowen*..... 286

6. BROKERS—COMMISSIONS—DIVISION. The rule for the division of a broker's commission where two brokers cooperate in effecting the sale is not applicable where one broker took no part in accomplishing the deal, but only listed the property with the other broker. *Wilkins v. Kessinger*..... 447

7. BROKERS—COMPENSATION—ACTIONS—DEFENSES — FRAUD—PARTICIPATION BY PLAINTIFF. Upon an agreement by both parties to an exchange of properties that each should pay his own broker and that the one at fault should pay both, in an action by the brokers against the one at fault, the brokers cannot set up that a contemporaneous secret agreement for a less commission in case of defendant's fault was a fraud upon the other party to the contract, since the brokers were parties to the fraud, and the law will leave them where it finds them. *Lloyd v. Williamson*..... 505

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8. SAME—COMPENSATION—CONTRACTS—EVIDENCE — ORAL CONDITIONS TO VARY WRITING. In such a case, the contemporaneous secret agreement, being in writing, is properly considered in connection with the other written contract, and without reference to oral conditions. *Lloyd v. Williamson*..... 505

BULK STOCK LAW:

Insurable interest and liability of vendee for debts, see INSURANCE, 4.

BURDEN OF PROOF:

See PRINCIPAL AND SURETY, 5.
Conveyance between husband and wife, see HUSBAND AND WIFE, 3, 4.
Excessive tax, see TAXATION, 3.

CANCELLATION OF INSTRUMENTS:

Termination of lease, see LANDLORD AND TENANT.
Rescission of contracts, see VENDOR AND PURCHASER.

CARRIERS:

Regulation of jitneys, see CONSTITUTIONAL LAW, 4-8; STATUTES.

1. CARRIERS—INJURY TO PASSENGERS—SETTING DOWN PASSENGERS—NEGLIGENCE—DEATH—QUESTION FOR JURY. The cause of the death of a passenger alighting from a pay-as-you-enter street car, is not left entirely to speculation or conjecture, but is, with the negligence of the company, a question for the jury, where deceased was seen on the rear platform of the car when the car was being brought to a stop, and was next seen lying in the street about fifteen feet in the rear of the car, and the conductor was seen to reach up and ring the bell, and go back and pick him up, he having suffered injuries from which he died; since the movement of the passenger alighting from such a car with gates is under the control of the conductor, whose duty it was to hold the car until he had safely alighted, and the violence and circumstances of the fall make it more probable that the deceased did not fall in consequence of his negligence, but rather that he was thrown by a violent starting of the car. *Frescoln v. Puget Sound Traction, Light & Power Co*..... 59

2. SAME. The fact that the deceased was seen to fall headlong, instead of behind the car, does not take from the jury the question whether the accident was physically impossible from negligently starting the car. *Frescoln v. Puget Sound Traction, Light & Power Co*..... 59

3. CARRIERS—CARRIAGE OF PASSENGERS—TERMINATION OF RELATION—EJECTION—LIABILITY. Where a passenger remains on a boat for thirty or forty minutes after it arrives at his destination, for the reason that his wife was away and there "was no use to go home," and to talk to a man, he ceases to be a passenger, and liability for

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his ejection would depend upon whether he was wilfully or wantonly assaulted or whether more force was used than was reasonably necessary. *Duval v. Inland Navigation Co*..... 149

4. SAME — EJECTING PASSENGER — TORT OF EMPLOYER — DEFENSES—AIDING OFFICER. Under Rem. & Bal. Code, § 2365, making it the duty of every person to aid an officer in arresting any person if commanded so to do, the owner of a boat is not liable for the acts of the purser in ejecting a person from the boat, if the purser was acting under the direct command of a police officer and aiding him to make an arrest. *Duval v. Inland Navigation Co*..... 149

5. CARRIERS—MOTOR VEHICLES—REGULATION. The jitney bus act is not unconstitutional as requiring a surety bond without provision for substitutes of any kind, where it was not shown that there were no such companies authorized to do business in the state; the presumption being that such bonds are obtainable, and the court cannot know judicially that the requirement is unreasonable. *State v. Seattle Taxicab & Transfer Co*..... 416

6. SAME. The fact that such bonds were denied to those who were financially irresponsible does not show that the act was unreasonable or unconstitutional as prohibitive. *State v. Seattle Taxicab & Transfer Co.* 416

7. CARRIERS—CARRIAGE OF PASSENGERS—DEGREE OF CARE. The operator of an elevator being a common carrier of passengers, must exercise the "highest degree of care compatible with practical operation." *Davis v. Burke*..... 495

8. SAME—CARRIAGE OF PASSENGERS—ELEVATORS—NEGLIGENCE — INVITATION TO ENTER. Where an elevator door was open and the elevator boy was at his post when a passenger started to enter, there was an invitation to enter, and it was negligence to close the door or start the car before closing the door while the passenger was entering. *Davis v. Burke*..... 495

9. SAME—PASSENGER ELEVATORS—NEGLIGENCE—EVIDENCE — QUESTION FOR JURY. Where there was evidence that an elevator boy started to close the door and start an elevator while a passenger was entering, and at the trial contradicted statements made in writing at the time of the trial, negligence in the operation of the elevator is a question for the jury. *Davis v. Burke*..... 495

10. SAME—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. Where an elevator was standing at the floor where plaintiff attempted to enter and the door was open, and the elevator boy was at his post, it is proper to instruct to the effect that an intending passenger may assume that he may safely enter without stopping to look, listen or make a special examination. *Davis v. Burke*..... 495

CAUSE OF ACTION:

Joinder of, see ACTION.

CERTAINTY:

In contract, see ARBITRATION AND AWARD.
In laws, see FACTORS.
In pleading, see PLEADING, 2.
In information, see PROSTITUTION.

CERTIORARI:

Remedy by, see MANDAMUS, 2.

CHANGE OF POSSESSION:

Necessity as against creditors of grantor, see FRAUDULENT CONVEYANCES, 1, 5, 6.

CHARGE:

To jury in criminal prosecutions, see CRIMINAL LAW, 3-5, 7.
To jury in civil actions, see TRIAL.
For storage, see WAREHOUSEMEN.

CHATTEL MORTGAGES:

In fraud of creditors, see FRAUDULENT CONVEYANCES, 1, 2.
Findings proposed in foreclosure, see TRIAL, 1, 2.

1. CHATTEL MORTGAGES—VALIDITY—AFFIDAVIT OF GOOD FAITH—CREDITORS—STATUTES. Under Rem. & Bal. Code, § 3660, declaring that a chattel mortgage without a mortgagor's affidavit of good faith is void "as against creditors of the mortgagor or subsequent purchaser, or encumbrancers of the property for value and in good faith," such a mortgage is void as to creditors regardless of notice, and a creditor does not lose his status as such by subsequently taking security and becoming an "encumbrancer" with notice of the prior mortgage. *Belcher v. Young* 303

2. CHATTEL MORTGAGES—FORECLOSURE—PARTIES DEFENDANT. In an action to foreclose a chattel mortgage on a crop of grain, one to whom it was sold and is theoretically in possession is a proper party. *Bollen v. Wilson Creek Union Grain & Trading Co*..... 400

3. SAME—ACTION FOR DESTRUCTION OF LIENS. A chattel mortgagee of a crop of grain may maintain an action in trover against one to whom the grain was sold and delivered and who put the mortgaged property beyond the reach of the mortgagee, he being liable in damages for destruction of the lien. *Bollen v. Wilson Creek Union Grain & Trading Co*..... 400

4. CHATTEL MORTGAGES—DESCRIPTION—PRIORITIES—WAIVER OF LIEN. A description in a chattel mortgage which is good as between the parties is good as against a prior vendee or mortgagee who, by his own fault and laches in failing to properly record his instrument,

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lost his title as against subsequent purchasers or incumbrancers. *Bonneviere v. Cole*..... 526

5. SAME—DESCRIPTION OF PROPERTY — SUFFICIENCY. As between a mortgagor and mortgagee, a description in a chattel mortgage of "all household furniture, furnishings and personal effects, being all the property of like description located at that place or belonging to the parties of the first part," and stated as located in a certain warehouse in the city of B., is sufficient to include furniture, furnishings and personal effects of the mortgagors located at their residence in B., it appearing that it was crated and ready to be removed to the warehouse, and there being in fact no furniture at the warehouse, but only a few boxes and trunks of articles of small value; a particular description of the location not being essential where it can be located in the county. *Bonneviere v. Cole*..... 526

6. CHATTEL MORTGAGES—PRIORITIES—RECORDING—REQUISITES — STATUTES. Under Rem. & Bal. Code, §§ 3661, 3668, requiring chattel mortgages to be recorded or indexed in books kept exclusively for that purpose, and § 3662, providing that such recording or indexing shall be full and sufficient notice to all the world, constructive notice of a prior incumbrance is not given by the filing and recording of an instrument in the Bill of Sale records which, on its face, was in form an absolute bill of sale but had attached an affidavit of good faith by the grantors, designated as mortgagors, as required of chattel mortgages; such instrument not having been recorded within ten days as required of bills of sale by Id., § 5291. *Bonneviere v. Cole*..... 526

CHECKS:

See BANKS AND BANKING.

CHILD:

See ADOPTION; BASTARDS; EXEMPTIONS, 1.

CITATION:

On appeal, see APPEAL AND ERROR 8.

CITIES:

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CITIZENS:

Privileges and immunities, see CONSTITUTIONAL LAW, 2-5, 7,

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See CONSTITUTIONAL LAW.

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See CONSTITUTIONAL LAW, 3-5.

CLOUD ON TITLE:

See QUIETING TITLE.
By recording contract, see RECORDS.

COLLATERAL ATTACK:

On judgment, see JUDGMENT, 6-10.

COLLATERAL UNDERTAKING:

See FRAUDS, STATUTE OF.

COLLEGES AND UNIVERSITIES:

1. COLLEGES AND UNIVERSITIES — TUITION AT STATE UNIVERSITY — STATUTES—CONSTITUTIONALITY. Laws 1915, p. 239, providing an entrance and tuition fees to be charged to students of the university of Washington is a valid exercise of legislative authority; as it is not forbidden by Const., art. 26, par. 4, requiring the establishment of systems of public schools free from sectarian control and "open to all children of the state"; art. 9, § 1, requiring ample provision for the education of all resident children, without distinction or preference; or art. 9, § 2, providing for a general and uniform system of public schools, to include common schools and such high schools, normal schools and technical schools as may hereafter be established. *Litchman v. Shannon* 186

COLLISION:

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Of actions, see ACTIONS, 3.

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On evidence in instructions, see BROKERS, 3; CRIMINAL LAW, 3; TRIAL, 4, 5.

COMMERCE:

1. COMMERCE—"INTERSTATE COMMERCE"—QUESTION FOR JURY. Where the facts relating to the service of a railroad employee are not conceded or established by proof so conclusive that there can be no reasonable difference of opinion about them, whether he was engaged in state or interstate commerce is a question for the jury under proper instructions. *Bolch v. Chicago, Milwaukee & St. Paul R. Co.* 47

2. SAME—"INTERSTATE COMMERCE"—WHAT CONSTITUTES. Where, in order to move repaired empty cars from the repair track in a switch yard, it was necessary to move and replace three unrepaired cars, one of which was loaded with lumber destined to a point in another

COMMERCE—CONTINUED.

state, the movement of such loaded car by a switching crew is a service rendered in the movement of interstate commerce, within the Federal employers' liability act; since the repair and every movement of such loaded car was an incident necessary to its furtherance on its journey. *Bolch v. Chicago, Milwaukee & St. Paul R. Co.*. 47

3. COMMERCE—INTERSTATE COMMERCE — EMPLOYMENT — FEDERAL EMPLOYERS' LIABILITY ACT. An express messenger is employed in interstate commerce, within the Employers' liability act, where he was serving the electric light plant in the express car to illuminate an interstate train, and was paid by both companies and under obligation to stay with the train through several states; and it is unnecessary to show that interstate shipments or passengers were being carried at the time. *Wesseler v. Great Northern R. Co.*..... 234

COMMISSION MERCHANTS:

See FACTORS.

COMMISSIONS:

Of broker, see BROKERS.

COMMON CARRIERS:

See CARRIERS.

COMMON LAW:

Rights of bastards, see BASTARDS.
Right of action on bond, see RAILROADS, 3.

COMMUNITY PROPERTY:

See HOMESTEAD; HUSBAND AND WIFE.
Descent of, see BASTARDS.

COMPENSATION:

Of attorney, see ATTORNEY AND CLIENT.
Of broker, see BROKERS.
For property taken or damaged for public use, see EMINENT DOMAIN.
Of executor or administrator, see EXECUTORS AND ADMINISTRATORS.
Of agent, see PRINCIPAL AND AGENT, 7-9.
For storage, see WAREHOUSEMEN.

COMPLAINT:

In civil actions, see PLEADING.

COMPROMISE AND SETTLEMENT:

Of claim for personal injuries, see RELEASE.

COMPUTATION:

Of period of limitation, see LIMITATION OF ACTIONS.

CONCLUSION:

Of witness, see EVIDENCE, 3, 4.

CONCLUSIVENESS:

Of former decision, see APPEAL AND ERROR, 36, 37.
Of judgment, see JUDGMENT, 4-10.

CONDEMNATION:

Taking or damaging property for public use, see EMINENT DOMAIN.

CONDITIONAL SALES:

Election of seller, see ELECTION OF REMEDIES.

CONDITIONS:

In insurance policies, see INSURANCE, 5-7.

CONFESSIONS:

Of judgment, see JUDGMENT, 13, 14.

CONSIDERATION:

Admissibility of parol evidence to show, see EVIDENCE, 10.
Of fraudulent conveyance, see FRAUDULENT CONVEYANCES, 3.
For mortgage, see MORTGAGES, 5.

CONSOLIDATION:

Of actions, see MECHANICS' LIENS, 6.

CONSPIRACY:

1. CONSPIRACY—TO DEFRAUD—EVIDENCE—SUFFICIENCY. A conspiracy of attorneys in asserting a fictitious claim for damages from slander is not established by evidence of unethical conduct between the attorney and his client and in disclosing to plaintiff the contents of a letter inviting participation in a suit for slander, inducing the settlement, where the cause of action existed and the attorney did nothing that any attorney might not properly do in the interests of his client. *Monroe v. Rankin*..... 602

CONSTITUTIONAL LAW:

Limitations on jurisdiction, see APPEAL AND ERROR, 1.
Restrictions as to schools, see COLLEGES AND UNIVERSITIES.
Regulation of interstate commerce, see COMMERCE.
Indefiniteness of act, see FACTORS.
Vested rights, see FISH.
Full faith and credit to records of sister state, see JUDGMENT, 13, 14.
Partial invalidity of act, see STATUTES, 2.
Uniform rate of taxation, see TAXATION, 8-10.

1. CONSTITUTIONAL LAW—STATUTES—CONSTITUTIONALITY. — PRESUMPTIONS. The presumption is in favor of the constitutionality of acts

CONSTITUTIONAL LAW—CONTINUED.

of the legislature, and they will not be declared void unless there is no reasonable doubt about their invalidity. *Litchman v. Shannon* 186

2. CONSTITUTIONAL LAW—SPECIAL PRIVILEGES — FISH — REGULATION. The fisheries code of 1915 (Laws 1915, p. 67) is not unconstitutional as discriminatory between persons, in that it prohibits gill net fishing and other appliances other than hook and line in certain portions of some of the rivers flowing into Puget Sound, and allows it in others. *State v. Hals* 540

3. CONSTITUTIONAL LAW — CLASS LEGISLATION — PRIVILEGES AND IMMUNITIES—COLLEGES AND UNIVERSITIES. Laws 1915, p. 239, providing an entrance and tuition fees for students at the state university does not grant to any citizen or class privileges or immunities which upon the same terms shall not equally belong to all citizens, in violation of Const., art. 12, § 1, by reason of the fact that students in the state college of Washington are not charged entrance or tuition fees. *Litchman v. Shannon* 186

4. CONSTITUTIONAL LAW—CLASS LEGISLATION—EQUAL PROTECTION OF THE LAWS. The jitney bus act, Laws 1915, p. 227, does not violate Const., art. 2, § 19, prohibiting class legislation or the denial of the equal protection of the laws, in that motor carriers of passengers for hire on the public streets in cities of the first class are required to give a surety bond before engaging in business, while none is required of street cars; as the regulation is a reasonable exercise of the police power. *State v. Seattle Taxicab & Transfer Co.* 416

5. CONSTITUTIONAL LAW—CLASS LEGISLATION. The fact that carriers of the United States mails are exempted from the provision of the act does not render it void. *State v. Seattle Taxicab & Transfer Co.* 416

6. SAME—FEDERAL LIMITATIONS—APPLICATION. The act is not unconstitutional as invading the 4th and 5th amendments to the constitution of the United States, as they are limitations on the powers of the Federal government and have no application to state laws. *State v. Seattle Taxicab & Transfer Co* 416

7. SAME—CRIMINAL LAW — SELF-INCRIMINATION — IMPRISONMENT FOR DEBT. The act is not unconstitutional as violating Const., art. 1, §§ 9 and 17, providing that no person shall be compelled in any criminal case to be a witness against himself, and that there shall be no imprisonment for debt. *State v. Seattle Taxicab & Transfer Co...* 416

8. SAME—DUE PROCESS OF LAW. The act does not violate the due process clauses of the state and Federal constitutions. *State v. Seattle Taxicab & Transfer Co* 416

9. CONSTITUTIONAL LAW—DUE PROCESS—NOTICE—PROSTITUTION—NUISANCE—ABATEMENT—PENALTY—LIABILITY OF OWNER. The provision of the "Red Light" law, 3 Rem. & Bal. Code, § 946-1 *et seq.*, making

CONSTITUTIONAL LAW—CONTINUED.

the owner of a house used for the purposes of prostitution liable in person and property for a fine of $300, to be entered as part of the decree of abatement, is unconstitutional as the taking of property without due process of law, where the owner was not in possession and had no notice, actual or constructive, of the purposes for which the house was being used. *State ex rel. Kern v. Emerson* 565

CONTINGENT FEES:

See ATTORNEY AND CLIENT.

CONTINUANCE:

1. CONTINUANCE—CONDITION—DISCRETION. It is not an abuse of discretion to require the payment of $30 as a condition for granting a continuance, under Rem. & Bal. Code, § 484, authorizing a postponement of a trial on payment of a sum not exceeding ten dollars, besides fees of witnesses, where two prior postponements for the same cause (illness of defendant's wife) had been requested, the plaintiff and his wife as a witness had come some distance, and he had five other witnesses present, and the various expenses and costs were not itemized. *Casady v. Anderson*..... 296

CONTRACTORS:

Bonds of, see PRINCIPAL AND SURETY; RAILROADS.

CONTRACTS:

See BILLS AND NOTES; EXCHANGE OF PROPERTIES; EXECUTORS AND ADMINISTRATORS; INDEMNITY; INSURANCE; PAYMENT; PLEDGES; SALES; WAREHOUSEMEN.
Extras, joinder of cause for, see ACTIONS, 1.
Action in contract or tort, joinder of, see ACTION, 2.
Submission to arbitration, see ARBITRATION AND AWARD.
For fees, see ATTORNEY AND CLIENT.
Of corporations, see CORPORATIONS.
Operation and effect of customs or usages, see CUSTOMS AND USAGES.
Damages for breach, see DAMAGES, 7.
Fraud in bidding, see ESTOPPEL.
Agreements within statute of frauds, see FRAUDS, STATUTE OF.
Bids for highway work, see HIGHWAYS, 1.
Married women, see HUSBAND AND WIFE, 5.
Affecting community property, see HUSBAND AND WIFE.
Leases, see LANDLORD AND TENANT.
Ground for mechanics' liens, see MECHANICS' LIENS.
For public improvements, see MUNICIPAL CORPORATIONS, 9-11.
By agent, see PRINCIPAL AND AGENT, 3.
Between principal and agent, see PRINCIPAL AND AGENT, 1, 2, 7-9.
Suretyship, see PRINCIPAL AND SURETY.

CONTRACTS—CONTINUED.

Releasing claim for personal injuries, see RELEASE.
Sales of realty, see VENDOR AND PURCHASER.
For water, see WATERS AND WATER COURSES.
Implied contracts, see WORK AND LABOR.

1. CONTRACTS—ACTIONS—EVIDENCE—ADMISSIBILITY. In such a case evidence that, after the defendant had received and sold the goods, which belonged to the brother, he paid a creditor of the brother, pursuant to an agreement under which the goods were shipped to him, is admissible as tending to prove that the contract claimed by the plaintiff was never made. *Greenbaum v. Stern*..... 156

2. CONTRACTS — CONSTRUCTION — DETAILS — PERFORMANCE—EXCUSE—PREVENTION BY LAW. Although a written contract, complete in itself, for the crushing and removal of rock upon certain lots, provided that the rock crushing plant might occupy the premises, nonperformance is not excused, as being prevented "by law," by reason of an injunction obtained by an adjoining landowner preventing operation of the crusher installed on the lots; since such occupation was a mere detail of performance and not of the essence of the contract. *Brown v. Ehlinger*..... 585

3. SAME—PERFORMANCE—CONSTRUCTION—INTERLINEATIONS. The fact that the clause whereby the owner of the lots agreed to the crushing of rock thereon and agreed to add sufficient machinery to complete the work was interlined does not change the construction to be given to the contract, the interlineation or correction not being challenged for fraud. *Brown v. Ehlinger*..... 585

4. CONTRACTS—VALIDITY—DURESS. The threat to bring a civil suit for damages is not duress, where there was belief in good faith that there was in law a good cause of action. *Zent v. Lewis*... 651

CONTRIBUTION:

See JOINT ADVENTURES.

CONTRIBUTORY NEGLIGENCE:

See NEGLIGENCE.
Of passenger, see CARRIERS, 10.
Of servant, see MASTER AND SERVANT, 3-4.
Of person injured on street, see MUNICIPAL CORPORATIONS, 2.
Of person injured by street railroad, see STREET RAILROADS, 1.

CONVERSION:

See TROVER AND CONVERSION.

CONVEYANCES:

See CHATTEL MORTGAGES; HOMESTEAD; HUSBAND AND WIFE; MORTGAGES.
In fraud of creditors, see FRAUDULENT CONVEYANCES.

CONVEYANCES—CONTINUED.

Mortgaged property, see MORTGAGES.
In trust, see TRUSTS.
Contracts to convey, see VENDOR AND PURCHASER.

CORPORATIONS:

See BANKS AND BANKING; MUNICIPAL CORPORATIONS; RAILROADS.
Regulation of commerce, see COMMERCE.
Action on sale of stock, see JUDGMENT, 7.
Surety companies, see PRINCIPAL AND SURETY.
Taxation of corporations and corporate property, see TAXATION, 1, 2.
Water companies, see WATERS AND WATER COURSES, 3-10.

1. CORPORATIONS—REPRESENTATION—CONTRACTS BY OFFICER — RATIFICATION—LIABILITY. A twelve months' contract for advertising, made by the manager of a packing company without previous authority, is ratified by the corporation, where, after notice of the contract, it permitted three or four monthly payments from its funds, it was receiving the benefits, and continued to make payments on the contract three months more; and an agreement to charge the same back to the manager is unfair and without consideration. *Carstens Packing Co. v. Lewis C. Troughton, Incorporated*..... 196

2. CORPORATIONS—REPRESENTATION—AUTHORITY OF GENERAL MANAGER. The "general manager" of a corporation in apparent charge of its business of catching, canning, and selling salmon, without any limitations or restrictions as to his express authority, has implied authority to do whatever the corporation could do in the general scope of its business, including the employment of brokers to sell its products. *Kitzmiller v. Pacific Coast & Norway Packing Co*..... 357

3. SAME—GENERAL MANAGER—IMPLIED AUTHORITY. Where the general manager of a corporation engaged in catching, canning, and selling salmon, had sold salmon and employed brokers therefor while manager of a branch office, his contract with brokers to sell 10,000 cases in advance of the opening market price, at about the then current price, is not so unusual in its terms as to be beyond his implied authority as a general manager, he having apparent authority to exercise his judgment in the matter. *Kitzmiller v. Pacific Coast & Norway Packing Co.* 357

4. CORPORATIONS—CONTRACTS—ACTIONS—EVIDENCE — SUFFICIENCY. A promise by a newly formed corporation to pay the outstanding debts of a business purchased of one of the promoters, pursuant to a resolution reciting that such promoter "had offered to sell" the business for $3,000, is sufficiently established by the preliminary agreement to incorporate so providing, signed by the promoters, who became officers and directors and holders of all the capital stock of the new corporation; since the resolution referred to the previous agreement, and was an acceptance of the proposition therein contained. *Balfour, Guthrie & Co. v. Breslauer, Ramsey & Co*..... 441

COSTS:

As item of damage, see INJUNCTION, 1.
Of defense, as item of recovery, see INSURANCE, 11.

1. COSTS—ITEMS—WITNESS FEES. Costs may be taxed for witnesses subpoenaed although they were not sworn or their testimony was held inadmissible. *Low v. McDonald*..... 122

2. COSTS—ITEMS—APPEARANCE FEES. Appearance fees are properly taxed, although the venue was changed to another county where defendants resided. *Low v. McDonald*..... 122

3. COSTS—APPEAL—DECISION. An appellant who recovers a more favorable judgment on appeal is entitled to costs on appeal. *In re Tachi's Estate* 621

COTENANCY:

See TENANCY IN COMMON.

COUNTERCLAIM:

See PLEADING, 1.

COUNTIES:

Salary of officers, see MANDAMUS, 4.
Liability for medical attendance on paupers, see PAUPERS.

COUNTY COMMISSIONERS:

Review of orders, see APPEAL AND ERROR, 2; MANDAMUS, 1-4.

COURT COMMISSIONERS:

Salary, review of order fixing, see APPEAL AND ERROR, 2; MANDAMUS, 1.

COURTS:

Review of decisions, see APPEAL AND ERROR.
Jurisdiction after appeal, see DIVORCE, 5-7.
Power to modify judgment, see JUDGMENT, 12.
Power to amend report of referees, see PARTITION.
Province of court and jury, see TRIAL, 3, 8.
Jurisdiction to annul will of living person, see WILLS.

COVENANTS:

In insurance policies, see INSURANCE, 4-7.

CREDITORS:

Rights as to chattel mortgage by debtor, see CHATTEL MORTGAGES, 1.
Conveyances in fraud of, see FRAUDULENT CONVEYANCES.
Rights and remedies of surety, see PRINCIPAL AND SURETY, 1.
Remedies against surety, see PRINCIPAL AND SURETY, 2-5.
Rights against contractor giving bond, see RAILROADS, 1-3

CRIMINAL LAW:

See ABORTION; PROSTITUTION.
Bail, see BAIL.
Self-incrimination, see CONSTITUTIONAL LAW, 7.
Power of court to modify sentence, see JUDGMENT, 12.
Termination of prosecution, see MALICIOUS PROSECUTION.

1. CRIMINAL LAW—DEFENSES—INSANITY — DETERMINATION — DISCRETION—ABUSE. In the absence of any statute on the subject, it is discretionary for the trial court to enter upon an examination of an accused person to determine the question of his sanity with a view of determining the right of the state to put him upon trial or enter judgment against him; and it is not an abuse of discretion to refuse a motion for the appointment of a commission for that purpose where the motion was supported only by the verification of counsel that he believed his client to be insane, where the court had the benefit of observations during the trial, at which a jury determined that accused was not insane at the time of the commission of the offense. *State v. Peterson*..... 479

2. SAME—DEFENSES—INSANITY—INQUIRY — STATUTES. Rem. & Bal. Code, § 5953, authorizing the superior court to cause to be brought before it any person who is alleged to be insane and unsafe to be at large, has no application to a person convicted of crime and already in the custody of the court, and does not divest the trial court of its power to exercise its discretion as to an inquiry touching the defendant's sanity. *State v. Peterson*..... 479

3. CRIMINAL LAW—TRIAL—COMMENT ON EVIDENCE. It is not an unlawful comment on the evidence in a prosecution for abortion to warn the jury against consideration of the youth of the female or any question of policy or the wisdom of the prosecution. *State v. Russell* 474

4. CRIMINAL LAW—TRIAL — MISCONDUCT OF ATTORNEY — CURE BY INSTRUCTIONS. In a prosecution for the forgery of a check connected with pay rolls said to be in the possession of the defendant and which were not produced, the declaration of the prosecuting attorney in argument to the jury that the pay rolls would have "convicted the accused absolutely," while improper, is not so prejudicial that it was not cured by an immediate instruction to the jury to disregard the remarks and warning the prosecutor to keep within the record. *State v. Ackerman*..... 198

5. CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE. Upon a conviction of driving an automobile while intoxicated, newly discovered evidence that, observed shortly before the accident, "he gave no indications of being intoxicated," is merely cumulative, and not ground for a new trial. *Everett v. Phillips*..... 269

6. CRIMINAL LAW—APPEAL FROM JUSTICE—TRIAL—NEW INFORMATION. Upon appeal from justice court in a criminal case, the cause is trans-

CRIMINAL LAW—CONTINUED.

ferred to the superior court for trial *de novo*, and the court should, if the information is insufficient, allow a new information to be filed, and after arraignment and plea, proceed to trial thereon. *State v. Bryant*..... 20

7. CRIMINAL LAW—APPEAL—REVIEW—INSTRUCTIONS—REQUESTS. Error cannot be predicated upon the failure to give an instruction that a bill of sale would not be overcome by a mere preponderance of the evidence, in the absence of any request for such an instruction. *Low v. McDonald*..... 122

8. CRIMINAL LAW—APPEAL—REVIEW—VERDICT. A conviction of driving an automobile while intoxicated cannot be set aside as based only on conclusions of the witnesses as to the accused's condition, where the evidence contra was equally in the nature of opinions and there was a conflict in the evidence. *Everett v. Phillips*..... 269

CROSS-APPEALS:

Time for taking, see APPEAL AND ERROR, 8.

CROSS-EXAMINATION:

At former trial, see EVIDENCE, 6.
Of witnesses, see WITNESSES, 2.

CUSTODY:

Of child, see DIVORCE, 5.

CUSTOMS AND USAGES:

Admissibility of evidence of, see BANKS AND BANKING, 3.

1. CUSTOM AND USAGES—CONTRACTS—ADMISSIBILITY. Evidence of a local custom or usage is inadmissible to support the claims of either party as to the terms of a contract that is not ambiguous or of doubtful meaning. *Wilkins v. Kessinger*..... 447

2. SAME—PLEADING—NECESSITY... Evidence of a local custom or usage to divide a broker's commission is inadmissible in an action on implied contract, unless the existence of the custom is specially pleaded. *Wilkins v. Kessinger*..... 447

DAMAGES:

See MALICIOUS PROSECUTION, 1.
Personal injuries from assault, see ASSAULT AND BATTERY.
Compensation for property taken or damaged for public use, see EMINENT DOMAIN.
On injunction bond, see INJUNCTION, 1-3, 6.
For publication of libel, see LIBEL AND SLANDER, 3.
Injuries caused by public improvements, see MUNICIPAL CORPORATIONS, 12.

1. DAMAGES—PERSONAL INJURIES — PROXIMATE CAUSE — EVIDENCE — QUESTION FOR JURY. Whether plaintiff had tuberculosis of the spine,

DAMAGES—CONTINUED.

and his fall was the predisposing cause, is a question for the jury where three of seven physicians testified that he had that disease and attributed his condition to the fall. *Bolch v. Chicago, Milwaukee & St. Paul R. Co.*..... 47

2. DAMAGES—PERSONAL INJURIES—FRIGHT—PROXIMATE CAUSE. Damages are recoverable for physical injuries to the person resulting naturally from fright caused by defendants' negligent act where the same was the proximate cause of the injury, although there was no impact to the person preceding the fright. *O'Meara v. Russell*.. 557

3. SAME—PERSONAL INJURIES—MENTAL SUFFERING—FRIGHT. In an action for damages from physical injuries to the person caused by fright, it is not error to refuse to instruct that the plaintiff cannot recover for mental suffering "which was the result of fright and not of any physical injury," since the jury could have inferred that there could be no recovery where there was no physical injury causing the fright. *O'Meara v. Russell*..... 557

4. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $480 for personal injuries and damage to a buggy and harness is not excessive where plaintiff was unable to work for six weeks and sustained contusions and bruises causing considerable pain and suffering. *De Lys v. Powell-Sanders Co*..... 31

5. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $7,000 for personal injuries resulting in traumatic neurasthenia to an express messenger, 39 years of age, earning $1,380 a year, will not be set aside as excessive, where he had shrunk twenty pounds, lost appetite and suffered from sleeplessness, headaches and chills, and might not recover for a period of from eight months to three years, and had lost $2,000 in earnings before the trial. *Wesseler v. Great Northern R. Co*..... 234

6. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $5,000, for personal injuries sustained in an elevator accident by a man 38 years of age earning $125 to $200 per month, is not excessive where he received a fracture of the anterior inferior spine of the ilium, a part of the hip bone, of the descending ramus of the pelvis and partial separation of the sacro-iliac joint, and suffered great pain, his injuries were more or less permanent, and he was unable to pursue his former occupation. *Davis v. Burke*..... 495

7. DAMAGES—BREACH OF CONTRACT—DUTY TO MITIGATE. In an agent's action for damages for breach of contract for an exclusive selling agency, loss of services for eight months on account of the defective nature of the machines is properly reduced one-half, where plaintiff was as well aware of the extent of the breach at the end of three or four months as at the end of eight months. *Kennedy v. Meilicke Calculator Co.* ..... 238.

DEATH:

Evidence of, proximate cause, see CARRIERS, 1, 2.
Wrongful death caused by operation of street railroad, see STREET RAILROADS, 3-5.

DEBT:

Imprisonment for, see CONSTITUTIONAL LAW, 7.

DEBTOR AND CREDITOR:

See FRAUDULENT CONVEYANCES.

DECEDENTS:

Evidence of, at former trial, see EVIDENCE, 6.
Estates, see EXECUTORS AND ADMINISTRATORS.

DECLARATIONS:

As evidence in civil actions, see EVIDENCE, 7-9.

DEEDS:

See HOMESTEAD.
In fraud of creditors, see FRAUDULENT CONVEYANCES, 3.
Absolute deed as mortgage, see MORTGAGES, 3, 4.
In trust, see TRUSTS.

DEFAMATION:

See LIBEL AND SLANDER.

DEFINITENESS:

In contract, see ARBITRATION AND AWARD.
In laws, see FACTORS; STATUTES, 2.
In pleading, see PLEADING, 2.
In information, see PROSTITUTION.

DEMAND:

For payment of bill or note, see BILLS AND NOTES, 2, 3.

DEMURRER:

To evidence, see TRIAL, 3.

DEPARTURE:

See PLEADING, 1, 4.

DEPOSITS:

In bank, see BANKS AND BANKING.
Evidence of, see EVIDENCE, 3.

DESCENT AND DISTRIBUTION:

See BASTARDS; HOMESTEAD.

DESCRIPTION:

Of property mortgaged, see CHATTEL MORTGAGES, 5, 6.

DIRECTING VERDICT:

In civil actions, see TRIAL, 8.

DISCHARGE:

Of claim for personal injuries, see RELEASE.

DISCRETION:

Review of, see APPEAL AND ERROR, 2, 22; DIVORCE, 8; JUDGMENT, 11; MANDAMUS, 1-4.

DISMISSAL AND NONSUIT:

At trial, see TRIAL, 3.

1. DISMISSAL AND NONSUIT—WITH PREJUDICE. In an action by property owner for injunctive relief against alleged fraudulent excesses over the contract price, in which no fraud was shown, a dismissal with prejudice barring any subsequent action is proper. *McGillivrae v. Bremerton* 394

DISORDERLY HOUSE:

1. DISORDERLY HOUSES—PENALTY—"TAX." The fine of $300 put upon the property of an innocent owner, in abatement proceedings under the "Red Light Law," being a charge in gross and not according to its value, is a penalty and cannot be upheld as occupation tax or a "deterrent." *State ex rel. Kern v. Emerson*..... 565

DISSOLUTION:

Of injunction, see "INJUNCTION, 4-6.

DIVERSION:

Of water courses, see WATERS AND WATERS COURSES, 2.

DIVORCE:

Remarriage prohibited, see MARRIAGE.

1. DIVORCE—DECREE—VACATION — FRAUD IN PROCURING — EVIDENCE—SUFFICIENCY. A decree of divorce, granted on default after personal service, should not be vacated for fraud in preventing the wife from appearing and defending, where it merely appears that she might not have fully understood plaintiff's attorney, who did nothing to mislead her, and that plaintiff resided at their common home during the pendency of the action occupying a separate room. *Faulkner v. Faulkner* 74

2. SAME—VACATION—DEFENSES WAIVED. The fact that plaintiff in a divorce case was criminally intimate with another woman during the pendency of the action is not ground for vacating a default judg-

DIVORCE—CONTINUED.

ment, where defendant had knowledge of such intimacy in time to make a defense to the action. *Faulkner v. Faulkner*..... 74

3. SAME—VACATION—PUBLIC INTEREST—DISCRETION. The vacation of a default judgment of divorce because of public interest, after the right to take an appeal had expired, is a matter of discretion, and no abuse of discretion is shown by a refusal where the plaintiff had lawfully intermarried with a third person. *Faulkner v. Faulkner* 74

4. SAME—VACATION—GROUNDS—ERRONEOUS JUDGMENT. A decree of divorce is not void for failure of the record to show an allegation and finding as to the residence of the plaintiff or any finding of the specific facts upon which the decree rested, but is merely erroneous, and such defects are not ground for vacation of the decree by petition. *Faulkner v. Faulkner*..... 74

5. DIVORCE—DECREE—CUSTODY OF CHILD—ENFORCEMENT PENDING APPEAL. Where, by a decree of divorce, the custody of a child had been awarded to two different persons for alternate periods of six months, so that no question of the welfare of the child could be involved, the supreme court will not, by mandamus, compel the lower court to enforce its order, pending appeal, which it had declined to do on the ground of want of jurisdiction; since the supreme court, if it has jurisdiction, may treat the refusal of the lower court as a determination that the welfare of the child is not jeopardized by its remaining where it is. *State ex rel. Clark v. Superior Court*... 80

6. SAME—SUIT MONEY PENDING APPEAL—JURISDICTION. The superior court retains jurisdiction, after judgment in divorce actions, for the purpose of allowing suit money and attorney's fees pending appeal to the supreme court, and the supreme court will not entertain applications therefor. *State ex rel. Clark v. Superior Court*..... 80

7. SAME. The superior court does not lose jurisdiction to allow suit money and attorney's fees pending an appeal from a judgment of divorce by reason of the fact that the decree disposes of the property rights of the parties. *State ex rel. Clark v. Superior Court* 80

8. DIVORCE—ALIMONY—MODIFICATION—DISCRETION—REVIEW. The refusal to modify an award of alimony will not be disturbed on appeal unless abuse of discretion is clearly shown. *Cain v. Cain*.. 402

DOCUMENTS:

Secondary evidence, see EVIDENCE, 5.

DOMICILE:

Of divorced parties, see MARRIAGE.

DUE PROCESS OF LAW:

See CONSTITUTIONAL LAW, 8, 9.

DURESS:

See CONTRACTS, 4.

EASEMENTS:

Water rights, see WATERS AND WATER COURSES, 1.

1. EASEMENTS—ESTABLISHMENT—ADVERSE USE—NOTORIETY. There is no right by adverse use to maintain a city service water pipe across the land of another where the same was put down and used without the knowledge of the owner of the land, there being nothing to indicate its presence. *Davison v. Columbia Lodge No. 8, Knights of Pythias* 461

EJECTION:

Of passenger, see CARRIERS, 3, 4.

ELECTION OF REMEDIES:

1. ELECTION OF REMEDIES—CONDITIONAL SALES CONTRACT—ACTION FOR PRICE—SUBSEQUENT DEFAULTS. The commencement of an action upon a conditional sales contract to recover installments due on the purchase price constitutes an election of remedies, treating the sale as an absolute one, and bars an action to recover possession upon forfeiture for default in making payment of subsequent installments. *Eilers Music House v. Douglas*..... 683

ELEVATORS:

See CARRIERS, 7-10.

EMINENT DOMAIN:

1. EMINENT DOMAIN — DAMAGES — PRIVATE PROPERTY OF BOOM COMPANY—INSTRUCTIONS. In an action to condemn certain property of a boom company which the supreme court on a former appeal had decided to be its private property and not devoted to any public use, it is error to refuse to instruct that the jury could not take into consideration defendant's organization as a boom company in order to enhance or affect the damages for condemning property rights which were simply private property rights not devoted to a public use. *Washington Boom Co. v. Chehalis Boom Co*..... 350

2. EMINENT DOMAIN—PROCEEDINGS—DAMAGES—ASSESSMENT. A platted block of tide lands and contiguous unplatted uplands, are properly considered as separate parcels in awarding damages in eminent domain proceedings. *Seattle v. Dexter Horton Trust and Savings Bank* 661

3. SAME—DAMAGES—EVIDENCE—ADMISSIBILITY. Upon an issue as to the damages to be awarded for lands condemned for a street for which no grade had been established, proof as to what would be a reasonable grade is immaterial; as it would in no way enhance or diminish the damages. *Seattle v. Dexter Horton Trust and Savings Bank* 661

EMPLOYEES:

See MASTER AND SERVANT.

EMPLOYERS' LIABILITY ACT:

Federal act, see COMMERCE.

ENTRY:

Of judgment, see JUDGMENT, 1, 2.

EQUITABLE ESTOPPEL:

See ESTOPPEL.

EQUITY:

See FRAUDULENT CONVEYANCES; INJUNCTION; QUIETING TITLE; TRUSTS.
Equitable estoppel, see ESTOPPEL.

1. EQUITY—SEEKING AND DOING EQUITY—QUIETING TITLE — ADVERSE OCCUPANCY. Where both parties seek equitable relief in the quieting of title to a lot occupied adversely by the defendants by mistake for less than the statutory period, mistaking it for their own lot in the same addition, and the plaintiff, having the title and having paid taxes for ten years, had offered to exchange its lot, improved by defendants, for defendants' unimproved lot, the court will, upon the maxim that he who seeks equity must do equity, require defendants to make the offered exchange, or in the alternative at plaintiff's option, repay plaintiff all taxes and assessments it had paid upon its lot, occupied by defendants, from the time of defendants' entry to date. *Peoples Savings Bank v. Bufford*..... 204

ESTATES:

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.
Tenancy in common, see TENANCY IN COMMON.

ESTOPPEL:

On appeal, by deed, see APPEAL AND ERROR, 18.
By laches, see FRAUDULENT CONVEYANCES, 1.
To object to removal of goods, see INSURANCE, 7.
By judgment, see JUDGMENT, 4-10.
Acquiescence in modification of contract, see SALES, 2, 3.
By laches, see VENDOR AND PURCHASER, 3-7.

1. ESTOPPEL—IN PAIS—AGAINST STATE. The state is estopped to question the validity of a contract for highway work where it accepted the benefits and allowed the contractor to complete performance after knowledge that the successful bidder had obtained a fraudulent advantage over other bidders by means of a secret agreement with the owners of a patented process. *State ex rel. Washington Paving Co. v. Clausen*..... 450

EVIDENCE:

See ABORTION; ADOPTION; ADVERSE POSSESSION, 1; ARBITRATION AND AWARD; ATTORNEY AND CLIENT; ASSAULT AND BATTERY; BREACH OF MARRIAGE PROMISE, 2; CONSPIRACY; CORPORATIONS; CRIMINAL LAW; DAMAGES; EXPLOSIVES; FALSE IMPRISONMENT; FRAUDULENT CONVEYANCES, 3; PARTNERSHIP; PAYMENT; PRINCIPAL AND SURETY; STREET RAILROADS; TROVER AND CONVERSION.
Of deposit, see BANKS AND BANKING.
To vary writing, see BROKERS, 8.
For personal injuries, see CARRIERS.
Contributory negligence of passenger, see CARRIERS, 10.
For breach of contract, see CONTRACTS, 1.
Newly discovered evidence as ground of new trial, see CRIMINAL LAW, 5.
Existence of custom, see CUSTOMS AND USAGES.
Condemnation proceedings, see EMINENT DOMAIN.
Of fraud, sufficiency, see FRAUD.
Of foreign judgment, see JUDGMENT, 13, 14.
Of payment, see LIMITATION OF ACTIONS, 2.
In action for malicious prosecution, see MALICIOUS PROSECUTION, 2-4.
For injuries to servant in general, see MASTER AND SERVANT.
Foreclosure, see MORTGAGES, 3.
Deed as mortgage, see MORTGAGES, 3.
For personal injuries, see MUNICIPAL CORPORATIONS, 2, 3.
In action for commissions, see PARTNERSHIP.
Agency, see PRINCIPAL AND AGENT, 1, 2, 9.
Of agent's authority, see PRINCIPAL AND AGENT, 3-5.
To impeach release, see RELEASE.
Establishment of trust, see TRUSTS.
For rescission of contract to sell land, see VENDOR AND PURCHASER.
Perpetuation of testimony, see WILLS.
For services, see WORK AND LABOR.

1. EVIDENCE—JUDICIAL NOTICE—FOREIGN JUDGMENTS — ACTIONS. In order to give full faith and credit to a judgment of a sister state, the court may take judicial notice of all the statutes of the state which must have been taken into consideration in entering the judgment, including the statute of limitations. *Miller v. Miller* 333

2. EVIDENCE—JUDICIAL NOTICE — FOREIGN JUDGMENTS — ACTIONS. In determining whether the court of a sister state had jurisdiction to render a judgment sued on, judicial notice will be taken of the laws of such state; and it is therefore unnecessary to plead or prove that the court was a court of record. *Miller v. Miller*..... 333

3. EVIDENCE—CONCLUSION OF WITNESS. In an action upon a check, whether the teller took the check governed by the printed statement at the foot of the deposit slip cannot be shown by the statement of the teller, as it would be merely his conclusion, where noth-

EVIDENCE—CONTINUED.

ing was said beyond the mere passing of the time of day. *American Savings Bank & Trust Co. v. Dennis*..... 547

4. EVIDENCE—CONCLUSION OF WITNESS. A question as to whether a change was made in a contract while the witness was in the east and without his knowledge, is objectionable as calling for the conclusion of the witness as to a fact occurring in his absence. *Citizens Bank & Trust Co. v. Rudebeck*..... 612

5. EVIDENCE—BEST AND SECONDARY—EVIDENCE OF TITLE. The rule that only the best evidence of title, *i. e.*, the muniments of title such as deeds, etc., is admissible to show title applies only where the title is directly in issue, and not in an action for a broker's commission where it was only necessary to make a *prima facie* case by showing that a party was ready, willing and able to comply with a contract which called for a conveyance of the land by warranty deed. *Littlefield v. Bowen*..... 286

6. EVIDENCE—TESTIMONY OF DECEASED WITNESS AT FORMER TRIAL—OBJECTIONS. Under Rem. & Bal. Code, § 1247, making admissible the certified stenographer's report of the testimony of any witness, since deceased, given at a former trial, both direct and cross-examinations are admissible at a subsequent trial, if not subject to any objection which was properly made and improperly overruled on the first trial in favor of the same party making the same objection. *Scribner v. Palmer*..... 595

7. EVIDENCE—DECLARATIONS BY THIRD PERSON—ADMISSIONS AGAINST INTEREST. In an action on a promise to pay the debt of plaintiff's brother, pursuant to a tri-party agreement under which plaintiff shipped certain goods to defendant, extra judicial statements of the brother to the effect that no such agreement was made are admissible as declarations against interest by one having a common interest with plaintiff, since the brother would have benefited by defendant's performance. *Greenbaum v. Stern*..... 156

8. EVIDENCE—DECLARATIONS—THIRD PERSONS—ADMISSIBILITY. In an action by a dealer for the price of automobile tires sold, evidence of a conversation between representatives of the tire company, had when the plaintiff was not present and of which plaintiff had no knowledge, is inadmissible to prove that defendant bought the tires direct from the tire company. *Chambers v. Independent Asphalt Paving Co.*..... 380

9. SAME. In an action by a dealer for the price of automobile tires sold, evidence of a settlement between defendant and the tire company covering tires sold to defendant by the company is inadmissible. *Chambers v. Independent Asphalt Paving Co*..... 380

10. EVIDENCE—PAROL EVIDENCE TO VARY WRITING — DEEDS — LIMITATIONS—CONSIDERATION. A quitclaim deed from husband to wife, ab-

EVIDENCE—CONTINUED.

solute on its face, cannot be shown by parol to have been made in consideration of an oral agreement that the grantee should hold the premises as a home for the parties and make a will devising the same to the grantor; since it would engraft upon the deed a reservation or limitation at variance with the grant, which cannot be done by parol; nor under the guise of proving a consideration. *Erfurth v. Erfurth* 521

11. EVIDENCE—PAROL EVIDENCE—TO VARY WRITING. A memorandum of sale of "all poles owned by us at Gray's Spur," cannot be explained or varied by oral evidence as to what the vendor intended to sell. *Bayley v. National Pole Co*..... 664

EXCEPTIONS:

Necessity for purpose of review, see APPEAL AND ERROR, 5-7.
Bill of, necessity for review, see APPEAL AND ERROR, 9, 10.

EXCESSIVE DAMAGES:

See DAMAGES, 4-7.

EXCHANGE OF PROPERTY:

Joinder of causes of action, see ACTIONS, 2.
Contract for commissions, see BROKERS, 5-8.
Waiver of tender, see TENDER.

1. EXCHANGE OF PROPERTIES—CONTRACT—TIME. Where a contract for the exchange of properties did not provide for its termination, a reasonable time is implied. *Littlefield v. Bowen*..... 286

2. SAME — CONTRACT — BREACH — JUSTIFICATION. The fact that one party to an exchange notified the other that they would consider the contract terminated if not performed on a certain date, does not justify nonperformance by the other party, where it appears that negotiations extended beyond that time and ample time was given for performance, and after many objections to the form of the papers, performance was refused, regardless of any date previously fixed therefor. *Littlefield v. Bowen*..... 286

EXECUTION:

Exemptions, see EXEMPTIONS; HOMESTEAD.
Compelling levy by sheriff, see MANDAMUS, 6.
Selection of newspaper for notice of sale, see NEWSPAPERS.

EXECUTORS AND ADMINISTRATORS:

See WILLS.

1. EXECUTORS AND ADMINISTRATORS — COMPENSATION — CONTRACTS — FINAL ACCOUNT—MATTERS CONSIDERED. An agreement by the widow and sole heir that she waive her right to administration and that the deceased partner in certain real estate act as administrator and

EXECUTORS AND ADMINISTRATORS—CONTINUED.

receive one-half of the commissions allowed by law upon other than partnership property, should be enforced in the probate proceedings on the final accounting. *In re Tachi's Estate*..... 621

EXEMPTIONS:

See HOMESTEAD.
From taxation, see TAXATION, 8-11.

1. EXEMPTIONS — "HEAD OF FAMILY" — "HOUSEHOLDER" — "CHILD" — STATUTES. A man living on the premises with his illegitimate minor child cannot claim a homestead exemption as the head of a family or a householder, within Rem. & Bal. Code, §§ 553 and 565, defining the head of a family and a householder as every person who has . . . his minor child residing with him or under his care and maintenance. *Peerless Pacific Co. v. Burckhard*..... 221

2. EXEMPTIONS—INSURANCE MONEY—TIME OF FIRE—HOMESTEAD SUBSEQUENTLY PERFECTED. Where the right to claim a homestead exemption in a house destroyed by fire did not exist at the time of the fire, an exemption in the insurance money cannot be claimed, although a homestead exemption was thereafter perfected before the trial in an action garnisheeing the insurance money; in view of Rem. & Bal. Code, § 568, which exempts insurance money only "whenever property which by the laws of the state is exempt from execution or attachment, is insured and is destroyed by fire," etc. *Peerless Pacific Co. v. Burckhard*..... 221

3. EXEMPTIONS — NONRESIDENTS — STATUTES. Nonresidents cannot claim exemptions from execution, in view of Rem. & Bal. Code, § 571, to the effect that the statute relating to exemptions from execution or attachment shall not be construed to exempt property of nonresidents. *Churchill v. Miller*..... 694

EXPLOSIVES:

1. EXPLOSIVES—NEGLIGENCE—EVIDENCE—ADMISSIBILITY. In an action for personal injuries from blasting in a city, evidence that defendants had no license to use explosives is not prejudicial, where the negligence was admitted. *O'Meara v. Russell*..... 557

EXTRAS:

Joinder of causes of action for, see ACTIONS, 1.

FACTORS:

See PRINCIPAL AND AGENT, 9.

1. FACTORS—REGULATION — "COMMISSION MERCHANTS" — STATUTES — DEFINITENESS. Rem. & Bal. Code, § 7033, regulating commission merchants, who are defined as persons whose "principal" business is the sale of farm, dairy, orchard or garden produce on account of the shipper, and making it a misdemeanor for them to do business

FACTORS—CONTINUED.

without a license, is void; since the definition attempted is fatally vague and fails to sufficiently indicate to whom the law is applicable. *State v. Powles & Co*..... 112

FALSE IMPRISONMENT:

1. FALSE IMPRISONMENT—MALICIOUS PROSECUTION—EVIDENCE—NEWSPAPER ACCOUNTS—ADMISSIBILITY. In an action for false arrest and imprisonment, it is reversible error to admit in evidence newspaper articles relative to the arrest which contain matters other than may be ascertained from the charge against plaintiff and the proceedings had thereon, where the defendants were in no way responsible for the publications. *Duval v. Inland Navigation Co*..... 149

FEDERAL LIABILITY ACT:

See COMMERCE; MASTER AND SERVANT, 2-4.

FEES:

Of attorney, see ATTORNEY AND CLIENT.
Of attorney as item of damage, see INJUNCTION, 1, 6; INSURANCE, 11.
Witness fees as costs, see COSTS, 1.

FENCES:

Liability for trespassing animals for want of fence, see ADJOINING LANDOWNERS.
Along railroad rights of way, see RAILROADS, 6.

FIDELITY BONDS:

See PRINCIPAL AND SURETY.

FINAL JUDGMENT:

Appealability, see APPEAL AND ERROR, 4.

FINDINGS:

Necessity, see APPEAL AND ERROR, 5, 6.
Review on appeal, see APPEAL AND ERROR, 23-30.
By court in civil actions, see TRIAL, 1, 2.

FINES:

When not a tax, see DISORDERLY HOUSES.

FISH:

Regulation of fishing, see CONSTITUTIONAL LAW, 2.

1. FISH — LICENSES — REVOCATION — REPEAL OF STATUTE — PROPERTY RIGHTS. The right to take fish and to a fishing location and to the renewal of licenses therefor, by virtue of a survey, location and occupancy pursuant to Rem. & Bal. Code, § 5214, is not a property right nor anything more than a mere revocable license, which was lost on repeal of that section by the fisheries code, Laws 1915, p. 75, § 20. *State v. Hals*..... 540

FORECLOSURE:

Of lien, see MECHANICS' LIENS.
Of mortgage, see CHATTEL MORTGAGES; MORTGAGES.
Of tax certificate, see TAXATION, 5-7.

FOREIGN CORPORATIONS:

Taxation of, see TAXATION, 1, 2.

FOREIGN JUDGMENTS:

Full faith and credit to, see JUDGMENT, 13, 14.

FOREIGN LAWS:

Judicial notice and pleading, see EVIDENCE, 1, 2.

FORFEITURE:

Of bail, see BAIL.
Of insurance, see INSURANCE, 4-7.

FORMER ADJUDICATION:

See JUDGMENT, 4-10.

FRAUD:

See CONSPIRACY; FRAUDULENT CONVEYANCES.
Relief denied either party, see BROKERS, 7.
In procuring divorce, see DIVORCE, 1.
In letting contract, see ESTOPPEL; HIGHWAYS, 1.
By assignee of mortgage, see MORTGAGES, 4.
Sales of realty, see VENDOR AND PURCHASER.
Examination of witness, see WITNESSES, 2.

1. FRAUD—MISREPRESENTATIONS—COMPLAINT — SUFFICIENCY. A complaint, liberally construed on demurrer as required by Rem. & Bal. Code, § 285, sufficiently states a cause of action for fraud, where it is alleged that plaintiffs were induced to purchase a house and lot in reliance upon false representations that the lot had a frontage of 60 feet and was free from vermin and disease germs, when in fact it had a frontage of but 50 feet and was so infested with vermin and diphtheria germs that one of plaintiff's children contracted diphtheria and the house had to be abandoned and was of no value. *Rochfort v. Quikstad*..... 432

2. FRAUD—EVIDENCE—ADMISSIBILITY. Where a witness had denied that he was in any way instrumental in inducing a fraudulent deal, but had written a letter showing intimate relations with one of the parties, cross-examination as to his motive in writing the letter is admissible as testing the truth of his denial. *Scribner v. Palmer* 595

3. FRAUD—EVIDENCE—ADMISSIBILITY. In an action for fraud and misrepresentations to the effect that a certain land contract was "gilt-edged" security, evidence of the value of the land is relevant and material. *Scribner v. Palmer*..... 595

FRAUDS, STATUTE OF:

Contract for commissions, see BROKERS.
Insurable interest in stock sold, see INSURANCE, 4.

1. FRAUDS, STATUTE OF—PROMISE TO PAY DEBT OF ANOTHER—ORIGINAL PROMISE. An oral agreement between plaintiff, his brother, and defendant whereby plaintiff agreed to ship to defendant certain goods belonging to the brother in consideration of defendant's agreeing to pay the brother's debt to plaintiff, is an original promise based upon a sufficient consideration, and hence not within the statute of frauds relating to a promise to pay the debt of another. *Greenbaum v. Stern* 156

FRAUDULENT CONVEYANCES:

Community property, see HUSBAND AND WIFE.

1. FRAUDULENT CONVEYANCES—SALES—RECORDING—VALIDITY — SUBSEQUENT CREDITORS—EQUITY—ESTOPPEL—LACHES. Although the failure to record a bill of sale of property remaining in the possession of the vendor within ten days, as required by Rem. & Bal. Code, § 5291, only invalidates the sale as to existing creditors, a vendee who fails to record his bill of sale for fourteen months, leaving the property in the possession of the vendors, who with intent to defraud thereafter mortgaged the same to the plaintiff without notice of the prior bill of sale, is estopped by his own fault and laches to assert a superior title under the bill of sale or under a subsequent oral sale without change of possession; upon the principle of equity that the one of two persons who enables a third person to commit a fraud must suffer the loss. *Bonneviere v. Cole*..... 526

2. SAME—"SUBSEQUENT PURCHASERS"—CHATTEL MORTGAGE. In such a case, the subsequent mortgagee is a subsequent purchaser within the meaning of the recording or registration act. *Bonneviere v. Cole* 526

3. FRAUDULENT CONVEYANCES—WANT OF CONSIDERATION—EVIDENCE—SUFFICIENCY. A conveyance of all the debtor's real property to his sister, upon threat of an action against him for breach of promise, is shown to be fraudulent as to creditors, where it appears that the only consideration was his alleged oral promise to pay his sister $15 a month towards the support of their niece, legally adopted by her upon the death of another sister, that the debtor was a bachelor, making his home with his sister for twenty years except when away at work, and during the thirteen years after the adoption, he had paid his sister no more than fair compensation for his board and lodging, although well able to make payments upon the alleged agreement, upon which payments had never been made; especially where he continued to exercise acts of ownership over the property after the conveyance. *Johnson v. Blomdahl*..... 625

FRAUDULENT CONVEYANCES—CONTINUED.

4. FRAUDULENT CONVEYANCES—"CREDITORS"—WHO ARE. One having a right of action for breach of marriage promise is a "creditor" from the time the right of action accrues, within the law relating to conveyances in fraud of creditors. *Johnson v. Blomdahl*..... 625

5. FRAUDULENT CONVEYANCES — VALIDITY — CHANGE OF POSSESSION. The giving of a bill of sale which was not recorded as required by Rem. & Bal. Code, § 5291, together with notice by the vendee to a third person not having possession, is not a sufficient change of possession to pass title. *Churchill v. Miller*..... 694

6. FRAUDULENT CONVEYANCES — VALIDITY — CHANGE OF POSSESSION. Under Rem. & Bal. Code, § 5291, providing that no bill of sale of personal property shall be valid as against existing creditors, where the property is left in the possession of the vendor, unless the bill of sale is recorded, etc., there was no change of possession of a piano and other goods, left by the vendors for two years in a room reserved for storage upon renting their house, where the tenant had no possession or control of the goods, and the only act of the vendee in taking possession was to notify the tenant that he had bought the piano. *Churchill v. Miller*..... 694

FRIGHT:

As element of personal injuries, see DAMAGES, 2, 3.

FULL FAITH AND CREDIT:

See JUDGMENT, 13, 14.

GENERAL CIRCULATION:

See NEWSPAPERS.

GOOD FAITH:

Of purchaser, see VENDOR AND PURCHASER, 1.
Burden of proof, see HUSBAND AND WIFE, 3, 4.

GRANTS:

To beds and shores, see NAVIGABLE WATERS.

GUARANTY:

See INDEMNITY; PRINCIPAL AND SURETY.
Requirements of statute of frauds, see FRAUDS, STATUTE OF.
Of note, see JUDGMENT, 7.

HARMLESS ERROR:

In civil actions, see APPEAL AND ERROR, 32-35.

HEAD OF FAMILY:

See EXEMPTIONS, 1.

HEIRS:

See BASTARDS.

HIGHWAYS:

1. HIGHWAYS—CONSTRUCTION WORK—COMPETITIVE BIDDING. A contract for highway work, required by 3 Rem. & Bal. Code, § 5879-9, to be let upon competitive bidding to the lowest responsible bidder, is not void, but only voidable, for the fraud of the owner of a patented process in making a secret contract with the successful bidder reducing to him the price of the patented process, which the call for bids required to be furnished at the same price to all bidders. *State ex rel. Washington Paving Co. v. Clausen*..... 450

2. HIGHWAYS — NEGLIGENT USE — COLLISION — AUTOMOBILES — JOINT OWNER—LIABILITY. Where one of two partners or joint owners of an automobile was using it on a pleasure trip of his own, and not on behalf of or within the reasonable scope of any partnership business, the other owner is not liable for damages sustained in a collision through the negligent driving of his co-owner. *Hamilton v. Vioue* 618

3. SAME—STATUTES. Laws 1915, p. 396, § 33, providing that the owner of an automobile shall be equally liable with an agent or any person employed by him to operate it, does not render a joint owner of an automobile liable for the negligence of his co-owner when driving the car for his own pleasure. *Hamilton v. Vioue*..... 618

HIRE:

Liability for hire of animals, see ANIMALS.

HOMESTEAD:

See EXEMPTIONS.

1. HOMESTEAD — SELECTION — RIGHT TO DECLARE — COMMUNITY PROPERTY—CONVEYANCES. A husband may, after the death of his wife, declare a homestead in community property and sell and convey it by his own deed in full fee simple title. *Moyses v. Nyboe*..... 257

HOUSEHOLDER:

See EXEMPTIONS, 1.

HUSBAND AND WIFE:

See DIVORCE; MARRIAGE.
Rights of survivor, see HOMESTEAD.

1. HUSBAND AND WIFE—COMMUNITY PROPERTY—CONTRACTS BY HUSBAND—EMPLOYMENT OF ATTORNEY—ACQUIESCENCE BY WIFE. The husband's contract employing an attorney on behalf of the marital community to establish a trust in community lands and recover a share in a joint venture relating to the same cannot be avoided by the wife,

HUSBAND AND WIFE—CONTINUED.

as not authorized by her, where she was a party to all the suits brought relating to the matter, was represented by the attorney therein, showed considerable interest and concern in the litigation, and was consulted in regard to it, and the litigation was brought for the benefit of the community and resulted in benefit to it. *Thomas v. Scougale*..... 162

2. HUSBAND AND WIFE—COMMUNITY PROPERTY—LIABILITY—TORTS OF HUSBAND. Community property is not subject to the lien of a judgment recovered against the husband for a tort which was not committed for the benefit of the community. *Wilson v. Stone*..... 365

3. HUSBAND AND WIFE — COMMUNITY PROPERTY — CONVEYANCE BETWEEN—GOOD FAITH—BURDEN OF PROOF—STATUTES. Rem. & Bal. Code, § 5292, providing that, when any question arises as to the good faith of any transaction between husband and wife, the burden shall be upon the party asserting the good faith, has reference only to creditors as holders of existing equities, and does not apply in actions between husband and wife; since the same must be construed as *in pari materia* with Id., § 8766, providing that every deed from husband to wife shall operate to divest the real estate from any and every claim or demand as community property, and vest the same in the grantee as separate property; as the latter section is particular in its terms, and the former general. *Erfurth v. Erfurth* 521

4. SAME—ACTIONS BETWEEN—CONVEYANCES — PRESUMPTION OF GOOD FAITH—BURDEN OF PROOF. In an action by a wife to remove the cloud of a community property claim filed by the husband, after having quitclaimed the property to her, the deed being admitted, the burden is upon the defendant to overcome the effect of the deed, as the same is entitled to the presumption of good faith. *Erfurth v. Erfurth*..... 521

5. HUSBAND AND WIFE—COMMUNITY DEBT—JOINT NOTE—LIABILITY OF WIFE. A note signed by husband and wife reciting that "I or we promise to pay," etc., being a joint and several note under Rem. & Bal. Code, § 3408, subd. 7, binds the separate and community property of both husband and wife, although given for a community debt. *Churchill v. Miller*..... 694

ILLEGITIMATE CHILDREN:

See BASTARDS; EXEMPTIONS, 1.

IMPLICATION:

Creation of easement by implication, see EASEMENTS.

IMPLIED CONTRACTS:

See WORK AND LABOR.

IMPRISONMENT:

See FALSE IMPRISONMENT.
For debt, see CONSTITUTIONAL LAW, 7.

IMPROVEMENTS:

Liens, see MECHANICS' LIENS.
Public improvements, see MUNICIPAL CORPORATIONS, 4-13.

IMPUTED NEGLIGENCE:

See NEGLIGENCE.

INCRIMINATION:

By self, see CONSTITUTIONAL LAW, 7.

INDEMNITY:

See INSURANCE, 8-10; PRINCIPAL AND SURETY.
Guarantee of note, see JUDGMENT, 7.

1. INDEMNITY—CONTRACT—CONSTRUCTION. Where the purchaser of stock in a corporation gave his note for the price at par, and later made an arrangement whereby the payee agreed to take back the stock and satisfy the note when the stock was sold, evidenced by a receipt of the shares of stock "for sale at par," and agreeing to pay the maker any interest he might pay on the note, and reciting "Maturity note sale stock," the agreement was one in effect guaranteeing to pay both principal and interest of the note upon sale of the stock; and upon such sale, the payee was liable for the payment of the note to an indorsee for value, and for cancellation of the note. *Johnson v. Carr* 106

INDICTMENT AND INFORMATION:

See ABORTION, 1.
Forfeiture of bail on insufficient information, see BAIL.
New information on appeal from justice of peace, see CRIMINAL LAW, 6.
Sufficiency of, see PROSTITUTION.

INDORSEMENT:

Of bill of exchange or promissory note, see BILLS AND NOTES, 2, 3.

INFANTS:

See ADOPTION.
Custody and support on divorce of parents, see DIVORCE, 5.

INHERITANCE:

Right of, see BASTARDS.

INJUNCTION:

1. INJUNCTION—ACTION ON BOND—DAMAGES—COSTS OF SUIT—UNCONTESTED INJUNCTION. In an action upon an injunction bond given to

INJUNCTION—CONTINUED.

transfer a chattel mortgage foreclosure to the superior court, an item of $350 expended by plaintiff for attorney's fees in the foreclosure suit cannot be recovered, no motion having been made to dissolve the injunction, which was not contested. *Kitsap County Bank v. United States Fidelity & Guaranty Co*..... 12

2. SAME—DAMAGES—KEEP OF PROPERTY—INDEPENDENT TITLE—UNCONTESTED INJUNCTION. In an action upon an injunction bond given to transfer a chattel mortgage foreclosure to the superior court, expenditures by the plaintiff for clerk's, sheriff's, and keeper's fees, horse feed and other costs of maintaining the property cannot be recovered where the injunction was not dissolved or contested, and the plaintiff recovered possession of the property in an independent action of replevin, impliedly under an independent title; since the expenditures were made by plaintiff in the care of its own property and were not necessitated by the injunction. *Kitsap County Bank v. United States Fidelity & Guaranty Co*..... 12

3. SAME—DAMAGES—DETERIORATION—LOSS OF SALE. In an action upon an injunction bond given to transfer a chattel mortgage foreclosure to the superior court, the plaintiff can recover the damages by reason of the depreciation in the value of the property that would have been avoided by the advertised foreclosure sale, which was lost to plaintiff by reason of the injunction. *Kitsap County Bank v. United States Fidelity & Guaranty Co*..... 12

4. INJUNCTION—ORDER—QUASHING SERVICE—SCOPE. Where, on a special appearance to quash the service of a temporary restraining order, the court entered an order that "said writ and the service thereof is hereby quashed," but fixed a new return date, the effect of the order was to quash the service only and not the writ. *Mann v. Becker* 534

5. SAME—WRONGFUL INJUNCTION—ACTION ON BOND—VOLUNTARY DISMISSAL—EFFECT. The voluntary dismissal of a suit for an injunction, on the specific ground of cessation of necessity for injunctive relief, is not the equivalent of a final decision that the plaintiff was not entitled to the order so as to warrant recovery upon the injunction bond. *Mann v. Becker*..... 534

6. SAME—ACTION ON INJUNCTION BOND—DAMAGES—ATTORNEY'S FEES. Where no motion was made for the dissolution of an injunction wrongfully sued out, nor any attack on the merits of the injunction, but only a special appearance attacking the service of the writ, attorney's fees cannot be recovered as an item of the damages in an action on the injunction bond. *Mann v. Becker*..... 534

IN PAIS:

Estoppel, see ESTOPPEL.

IN REM:

Judgment, see JUDGMENT, 14.

INSANE PERSONS:

Insanity as defense to crime, see CRIMINAL LAW, 1, 2.
Annulment of will, see WILLS.

INSTRUCTIONS:

In criminal prosecutions, see CRIMINAL LAW, 3-5, 7.
In civil actions, see TRIAL. See, also, BROKERS, 1-4; MALICIOUS PROSECUTION, 2-4; PARTNERSHIP; PRINCIPAL AND AGENT, 3; TROVER AND CONVERSION, 3.

INSURANCE:

Money, when exempt, see EXEMPTIONS, 2.

1. INSURANCE—THEFT—INTENT—MISUSE OF AUTOMOBILE—POLICY. A policy insuring an automobile against loss or damage by "theft, robbery or pilferage," does not cover a loss when the car was wrecked while lawfully in the possession of an employee of a garage company under instructions to deliver it to the owner, although such employee went out of his way in making the trip, where he had no intent to steal or pilfer it; as the policy covers only intentional stealing. *Stuht v. Maryland Motor Car Ins. Co*..... 576

2. INSURANCE—FIRE POLICY—PROOFS OF LOSS—NECESSITY. The making of proofs of loss by fire within sixty days, as required by the Washington standard form of policy, is a condition precedent to action unless such failure is due to a misleading of the insured by officers of the company. *Kuck v. Citizens' Ins. Co*..... 35

3. SAME—PROOFS OF LOSS—WAIVER. The requirement of proofs of loss within the time specified in the policy is not waived by the fact that an insurance agent and the adjuster investigated a fire loss in the absence of the insured and that the agent told the insured the adjuster would adjust the loss. *Kuck v. Citizens' Ins. Co*... 35

4. INSURANCE—FIRE INSURANCE—INSURABLE INTEREST—VENDEE'S LIABILITY TO CREDITORS—SALES IN BULK. Where a stock of goods worth $2,600, insured for $2,000, was sold and transferred for $300, with the accompanying affidavit required by the sales-in-bulk law (Rem. & Bal. Code, §§ 5296, 5297) showing creditors whose goods to the amount of $2,300, had not been paid for, the purchaser assumed the liabilities to the extent of the value of the goods, and hence had an insurable interest therein and could collect the insurance; notwithstanding an agreement between the parties to the sale that the goods unpaid for were to be returned to the creditors, since the creditors had not consented to that arrangement and were entitled to be paid in cash. *Osborne v. Phoenix Insurance Co*..... 387

INSURANCE—CONTINUED.

5. INSURANCE—POLICY—REMOVAL OF GOODS—FORFEITURE. A stipulation in a policy of fire insurance that the goods are insured only while at the designated location and that the policy shall be void if the property is removed without the company's consent, is of the essence of the contract, and the policy is annulled where the insured removed the goods without permission. *Johnson v. Franklin Insurance Co.* 631

6. SAME. Such clause is not merely a warranty or condition, under 3 Rem. & Bal. Code, § 6059-34, providing that breach of a warranty or condition shall not avoid the policy unless such breach contributes to the loss. *Johnson v. Franklin Insurance Co.* 631

7. SAME—POLICY—FORFEITURE—ESTOPPEL. Where an insured made request of an insurance agent for consent to the removal of goods, insured at a particular place, to a new location, as required by the policy, and removed the same on the next day without waiting for permission, the failure of the company to object does not work an estoppel to avoid the policy. *Johnson v. Franklin Insurance Co.* 631

8. INSURANCE—INDEMNITY—NOTICE—TIME—EXCUSE. Failure to give immediate notice of an accident, as required by a policy of indemnity insurance, will not avoid the policy where it was impossible to give notice until the insured had notice, which was done. *Shafer v. United States Casualty Co.* 687

9. SAME—NOTICE OF LOSS—BY MAIL—EVIDENCE—SUFFICIENCY. Evidence of the mailing of letters to insured, with return address thereon, to which no reply was received and that the letters were not returned, is insufficient to establish notice, where the insured denied having received the letters. *Shafer v. United States Casualty Co.* 687

10. SAME—INDEMNITY—NOTICE OF ACCIDENT—IMPUTED NOTICE — PRINCIPAL AND AGENT. Knowledge on the part of an employee through whose fault an accident happened is not imputed to the employer carrying a policy of indemnity insurance which required the insured to give "immediate" notice of an accident insured against. *Shafer v. United States Casualty Co.* 687

11. INSURANCE—INDEMNITY—POLICY — RECOVERY — COSTS OF DEFENSE. Where an indemnity company refused the tendered defense of a personal injury case, reasonable attorney's and witnesses' fees and expenses incurred by the insured are recoverable in an action on a policy of indemnity insurance providing that all expenses in defending the suit and costs assessed against the insured shall be paid by the indemnity company. *Shafer v. United States Casualty Co.* 687

INTERLINEATIONS:

In contracts, see CONTRACTS, 3.

INTERSTATE COMMERCE:

Persons engaged in, see COMMERCE.

JITNEYS:

See CARRIERS, 5, 6; CONSTITUTIONAL LAW, 4-8.
Act regulating, see STATUTES, 1.

JOINDER:

Of causes of action, see ACTION.

JOINT ADVENTURES:

1. JOINT ADVENTURES — MUTUAL RIGHTS — ACTIONS — CONTRIBUTION. Parties engaged in the business of owning and managing a stallion are engaged in a joint adventure and not in a general partnership, the rules of which do not apply; hence an action for contribution lies, although there had been no accounting, where one party has been compelled to pay more than his share of the common liability and the other party was under legal obligation to pay at the time the payment was made. *Peterson v. Nichols*..... 398

JOINT TENANCY:

See TENANCY IN COMMON.

JUDGES: ....

Comments on evidence, see BROKERS, 3; CRIMINAL LAW, 3; TRIAL, 5.

JUDGMENT:

Review, see APPEAL AND ERROR.
Effect of former judgment, see APPEAL AND ERROR, 1.
On appeal, conclusiveness, see APPEAL AND ERROR, 36, 37.
Of nonsuit, when bar, see DISMISSAL AND NONSUIT.
In divorce, see DIVORCE.
Foreign, judicial notice of, see EVIDENCE, 1, 2.
Lien against community property, see HUSBAND AND WIFE, 2.
Action on, see LIMITATION OF ACTIONS, 1.
On stipulation, see PRINCIPAL AND SURETY, 1.

1. JUDGMENT—ENTRY—NON OBSTANTE—TIME FOR MOTION—RECORD—MINUTE RECORD—PRESUMPTIONS. Where the clerk's minutes show a motion for judgment *non obstante veredicto* before judgment was entered, and do not show that it was passed upon, his minute entry of judgment is not a judgment, it being presumed that judgment was held in abeyance pending formal ruling, especially where the court notes the informality in the formal judgment, reciting that judgment was so held in abeyance; hence the record shows a timely motion for judgment *non obstante*. *Frescoln v. Puget Sound Traction, Light & Power Co*..... 59

2. JUDGMENT—ENTRY—NOTWITHSTANDING VERDICT—TIME — ENTRY OF VERDICT. The entry of verdict in the minute book and journals of

JUDGMENT—CONTINUED.

the court is not entry of the judgment, and does not bar entry of judgment *non obstante veredicto*, as would be the case if judgment had been entered. *Mattson v. Griffin Transfer Co*..... 1

3. SAME. Judgment *non obstante veredicto* may be granted after reception of the verdict, but can only be resorted to where there is no element of judicial discretion and the court can say there is no evidence or reasonable inference from evidence to sustain the verdict; otherwise, the remedy is by motion for a new trial. *Mattson v. Griffin Transfer Co*..... 1

4. JUDGMENT—BAR—SPLITTING CAUSES OF ACTION — EFFECT. Where plaintiffs, having deeded lands to defendants, who instead of securing an unpaid balance, defrauded the plaintiffs by mortgaging the lands to a third party and absconding, began two actions, the first, to recover damages in the amount of the mortgage, and the second to quiet title, which latter was amended to ask cancellation of the deed for the same fraud without asking a money judgment, judgment in the second action, granting cancellation, is a bar to recovery in the first action on the money demand; since the plaintiff attempted to divide a single cause of action, and judgment in the second suit concluded his rights. *Brice v. Starr*..... 369

5. SAME. It is immaterial that the mortgagee and another were made additional parties in the second action, since they were immaterial parties. *Brice v. Starr*..... 369

6. JUDGMENT—CONCLUSIVENESS—PARTIES CONCLUDED. A judgment in an action by a city involving only the power of a city to purchase a water supply system and the price to be paid, is not *res judicata* or a bar to an action by taxpayers to enjoin the issuance of bonds for the purchase; as the city was not bound to proceed if the price was unsatisfactory, and until it did the taxpayers were not interested. *Spear v. Bremerton*..... 507

7. JUDGMENT—RES JUDICATA—MATTERS CONCLUDED—IDENTITY OF PARTIES AND ISSUES. Where defendant, the payee of a note taken in payment for corporate stock, agreed to take the stock back, and guaranteed, upon sale of the stock, to pay the note, which he had indorsed for value, and thereafter, the indorsee of the note recovered judgment thereon against plaintiff, the maker's executrix, in an action in which defendant was not a party, the judgment therein is not *res judicata* or a bar to plaintiff's action against defendant on his guarantee of the note, although the plaintiff (defendant in the former action) sought therein to make the payee a party thereto and set up the whole transaction, charging fraud in the indorsement of the note, where the court in the former action made no finding on the question of fraud and refused to make defendant a party thereto, but simply found that the plaintiff in the former action was an indorsee for value and the owner and holder of the note; since

JUDGMENT—CONTINUED.

the issue as to defendant's guarantee was not proper to be tried in a cause wherein defendant was not a party, and the same was not adjudicated in the former action on the note. *Johnson v. Carr*.. 106

8. JUDGMENT—MATTERS CONCLUDED—ASSESSMENTS — VACATION — REASSESSMENTS. Any provision in a judgment vacating an assessment attempting to fix a limit to the power to reassess specific tracts, other than the natural limit of cost apportioned to the benefits, is beyond any legal issue and not binding on the supreme court on appeal. *East Hoquiam Co. v. Hoquiam*..... 210

9. SAME—MATTERS CONCLUDED—SPECIAL BENEFITS—REASSESSMENTS. A judgment vacating an assessment for a local improvement upon a finding that specific tracts were assessed in excess of the benefits conferred, is *res judicata* and binding upon the city and a bar to a reassessment of the same tracts for the same improvement in the same or greater amounts. *East Hoquiam Co. v. Hoquiam*..... 210

10. JUDGMENT—RES JUDICATA—MATTERS CONCLUDED. A judgment setting aside a local improvement assessment as made upon a fundamentally wrong basis, and as in excess of the benefits derived and in excess of the assessed valuation, is not *res judicata* and conclusive that the assessed valuation was the limit of the special benefits, although in a memorandum opinion the court expressed the opinion that the assessment was void because it exceeded the assessed valuation. *East Hoquiam Co. v. Hoquiam*..... 210

11. JUDGMENT — DEFAULT — VACATION — DISCRETION. The denial of a motion to vacate a judgment of default is not an abuse of discretion, where the action was commenced November 19, 1912, judgment was entered April 26, 1913, motion to vacate was not made until December 15, 1913, and the allegation that default was entered without notice while negotiations for settlement were pending was denied by counter affidavits. *Hazeltine v. Rockey*..... 248

12. JUDGMENT — MODIFICATION — MISTAKE — POWER OF COURT. After pronouncing judgment sentencing a convicted person to the state penitentiary, the trial judge has no power to modify the same so as to sentence the accused to the state reformatory, which was his intention in the first place, Rem. & Bal. Code, § 464, authorizing modification of judgments for "mistake, neglect, or omission of the clerk, or irregularity" not applying in such a case. *State ex rel. Lundin v. Superior Court*..... 299

13. JUDGMENT — FOREIGN JUDGMENT — WARRANT OF ATTORNEY TO CONFESS—FULL FAITH AND CREDIT. A judgment upon a note entered upon a warrant of attorney, contained in the note, to confess judgment without personal service, is a judgment within the meaning of the clause of U. S. Const. and the act of Congress requiring full faith and credit in each state to judicial proceedings of every other state; and

JUDGMENT—CONTINUED.

when rendered in the state where the debtor resided when the warrant was executed in strict conformity to the power, and recognized in such state as a valid judgment, will be given effect in this state although our laws do not authorize the practice of entering judgment by confession on a warrant of attorney. *Miller v. Miller*..... 333

14. SAME—FOREIGN JUDGMENTS—PROOF—PERSONAL SERVICE—STATUTES. Rem. & Bal. Code, § 1255, providing that a judgment for debt rendered in any other state against a resident of this state shall not be of any higher character as evidence of indebtedness than the original claim or demand, unless rendered upon personal service of summons, notice, or other due process, is merely intended to make a distinction between judgments *in personam* and *in rem*; and does not militate against the giving of full faith and credit to a judgment of a sister state rendered upon a warrant of attorney to confess judgment, as the same is a judgment *in personam*. *Miller v. Miller* 333

JUDICIAL NOTICE:

In civil actions, see EVIDENCE, 1, 2.

JURISDICTION:

Appellate jurisdiction, see APPEAL AND ERROR, 1.
Amount in controversy, see APPEAL AND ERROR, 3.
Custody of children of divorced parents, see DIVORCE, 5.
Necessary process, see MECHANICS' LIENS, 4, 5.

JURY:

Instructions in criminal prosecutions, see CRIMINAL LAW, 3-5, 7.
Custody and conduct, see TRIAL, 10, 11.

JUSTICES OF THE PEACE:

Appeal in criminal cases, see CRIMINAL LAW, 6.

JUSTIFICATION:

Of prosecution, see MALICIOUS PROSECUTION, 2-4.

LACHES:

In failing to record mortgage, see FRAUDULENT CONVEYANCES, 1.
In rescission of contract of sale, see VENDOR AND PURCHASER, 3-7.

LANDLORD AND TENANT:

1. LANDLORD AND TENANT — JOINT LEASE — PARTIAL ABANDONMENT. The lessee of three markets under the same lease for one gross rental, may abandon one of the markets with the lessor's assent. *Carstens Packing Co. v. Lewis C. Troughton, Incorporated*..... 196

LAW OF THE CASE:

See APPEAL AND ERROR, 36, 37.

LAWS:

See STATUTES.
Presumptions as to, see EVIDENCE, 1, 2.

LEASES:

See LANDLORD AND TENANT.
To cotenant, see TENANCY IN COMMON.

LEGISLATIVE POWER:

See CONSTITUTIONAL LAW.

LIBEL AND SLANDER:

1. LIBEL AND SLANDER—LIBEL PER SE—CHARGE OF CRIME—"BRIBERY" —SUFFICIENCY. A newspaper article headed "Bribery" and charging that one K. was offered a bribe in an appointment to a political job, that the offer was made in a certain office to which K. had been invited by plaintiff and that plaintiff was "one of the men present," the article inviting a prosecution for bribery by the prosecuting attorney, is not libelous *per se* as charging a crime and does not charge plaintiff with committing bribery. *Wood v. Star Publishing Co.* 85
2. SAME—LIBEL PER SE—PUBLIC HATRED AND COMMENT. Neither is such charge libelous *per se* as holding the plaintiff up to public hatred, contempt or ridicule, where, read twice, it merely leaves the impression that information could be obtained from plaintiff upon which to found a prosecution for bribery. *Wood v. Star Publishing Co.* 85
3. SAME—PLEADING—COMPLAINT—SUFFICIENCY—SPECIAL DAMAGES. A complaint for libel by an article not libelous *per se*, in which no special damages are alleged, is demurrable. *Wood v. Star Publishing Co.* 85

LICENSES:

For commission merchants, see FACTORS.
To fish, see FISH.

LIENS:

See MECHANICS' LIENS.
Mortgage, see CHATTEL MORTGAGES.
Pledge, see PLEDGES.
Liability of surety on bond, see PRINCIPAL AND SURETY, 1.
On railroads, see RAILROADS, 1-3.
Of warehousemen, see WAREHOUSEMEN.

LIMITATION OF ACTIONS:

See ADVERSE POSSESSION.
Duration of lien, see MECHANICS' LIENS, 2-6.
Time for taking appeal, see APPEAL AND ERROR, 8.
For breach of promise of marriage, see BREACH OF MARRIAGE PROMISE.
1.

LIMITATION OF ACTIONS—CONTINUED.

1. LIMITATIONS OF ACTIONS—TOLLING STATUTE—ABSENCE FROM STATE—ACTION ON JUDGMENT—PRESUMPTION. Where the record in an action upon a judgment of a sister state shows that the debtor removed from such state at some undisclosed date between the time of the accrual of the cause and the commencement of the action, it cannot be presumed that the action was barred by lapse of time, in view of Rem. & Bal. Code, § 168, suspending the statute of limitations during the absence of the debtor from the state. *Miller v. Miller*..... 333

2. LIMITATION OF ACTIONS—TOLLING STATUTE—PAYMENT ON NOTE—EVIDENCE—SUFFICIENCY. A finding that a payment was made on a note at the date shown by the indorsement, so as to toll the statute of limitations, is sustained by the evidence, although contradicted by the maker, where the maker had only his memory to rely on after the lapse of years, and there was nothing to show that the indorsement, which was a declaration against interest, was not made at the time it is purported to be made. *Miller v. Miller*..... 333

3. SAME—TOLLING STATUTE—ADVANCE PAYMENT OF INTEREST. Where the statute of limitations against a note is tolled by a payment of interest in advance, the limitation commences to run from the time to which interest is paid. *Miller v. Miller*..... 333

LOGS AND LOGGING:

Condemning property of boom company, see EMINENT DOMAIN, 1.

MALICIOUS PROSECUTION:

See FALSE IMPRISONMENT.

1. MALICIOUS PROSECUTION—DAMAGES—EXCESSIVENESS. Separate verdicts for malicious prosecution in favor of a husband and wife for $1,250, each, are excessive and should be reduced to $750, each, where it does not appear that the plaintiffs have been hurt in their standing or character. *Low v. McDonald*..... 122

2. MALICIOUS PROCECUTION—INSTRUCTIONS—WANT OF PROBABLE CAUSE. In an action for malicious prosecution, an instruction that, if the facts were not sufficient to induce in the minds of reasonable persons a belief in the guilt of the accused, then there would not be probable cause for the prosecution, is not erroneous as relieving the plaintiffs of the burden of proving want of probable cause. *Low v. McDonald* 122

3. MALICIOUS PROSECUTION — DEFENSES — CHARGE BY PROSECUTOR — TRUTH OF FACTS STATED—QUESTION FOR JURY. It is no defense to an action for malicious prosecution that the prosecuting attorney, to whom the matter was presented by defendants, abandoned a complaint of grand larceny on which plaintiffs were arrested and bound over, and filed an information and tried them for burglary in the second degree, on which they were acquitted; since the truth of the

MALICIOUS PROSECUTION—CONTINUED.

charge, whatever it was called, and whether the defendants fully and fairly stated all of the facts to the prosecuting attorney, were questions for the jury. *Low v. McDonald*..... 122

4. MALICIOUS PROSECUTION—EVIDENCE—FELONIOUS INTENT—ADMISSIBILITY—ORAL AGREEMENT TO VARY WRITING. In an action for malicious prosecution in charging plaintiffs with burglary in entering and taking goods covered in a bill of sale from plaintiffs to defendants, it was competent for plaintiffs to prove an oral collateral agreement reserving the goods, to show their good faith and want of felonious intent in the taking; since the bill of sale would not be conclusive on that issue in a criminal action. *Low v. McDonald* 122

MANDAMUS:

1. MANDAMUS—ADEQUACY OF REMEDY BY APPEAL. An order of the county commissioners fixing the salary of a court commissioner, involves the exercise of discretion which is unassailable unless arbitrary or capricious, which fact cannot be determined by review of the record; hence the remedy by appeal is inadequate and mandamus lies. *State ex rel. Yeargin v. Maschke*..... 249

2. MANDAMUS — ADEQUACY OF REMEDY BY CERTIORARI — DISCRETION—REVIEW—TRIAL DE NOVO. There is no right to trial *de novo* upon a review by writ of certiorari, and the remedy is inadequate to review an order of the county commissioners fixing the salary of a court commissioner, involving discretion; since, whether the order was arbitrary or capricious, can be determined only by trial *de novo*, and not by review of the record. *State ex rel. Yeargin v. Maschke.* 249

3. SAME—WHEN LIES—TO BOARDS — COUNTY COMMISSIONERS — DISCRETION — ARBITRARY ACTION. Where the board of county commissioners acts arbitrarily or refuses to exercise its discretion in fixing the salary of a court commissioner, mandamus will lie to require it to exercise its discretion. *State ex rel. Yeargin v. Maschke*.. 249

4. SAME — TO BOARDS — COUNTY COMMISSIONERS — FIXING SALARY — FAILURE TO EXERCISE DISCRETION—ABUSE — EVIDENCE — SUFFICIENCY. The action of the board of county commissioners in reducing the salary of a court commissioner from $15 to $1 a month, will be set aside as arbitrary and without the exercise of a proper discretion, where it appears that two members of the board were actuated by a personal or political enmity, had no knowledge of the scope of the powers or nature or extent of the duties of the office, and made no investigation of the records or inquiry of the judge making the appointment as to the amount of work, which had increased during the preceding years, and there was no presiding judge residing in the county. *State ex rel. Yeargin v. Maschke*..... 249

MANDAMUS—CONTINUED.

5. MANDAMUS — TO OFFICERS — MINISTERIAL ACTS — USELESS ACTS. While the duty of mayors of towns to sign ordinances is ministerial, mandamus does not lie to compel a mayor to sign an invalid ordinance, as the writ does not issue to require an officer to do a vain and useless thing. *State ex rel. Bothell v. Woody*..... 501

6. MANDAMUS—WHEN LIES — TO OFFICERS — ADEQUATE REMEDY AT LAW. Notwithstanding there may be an adequate remedy at law upon an officer's bond, mandamus lies to compel a sheriff to levy an execution, under Rem. & Bal. Code, § 1014, authorizing the issuance of the writ to any . . . person to compel the performance of an act especially enjoined by law as a duty resulting from an office. *State ex rel. Lewis v. Hodge*..... 487

MARRIAGE:

See BREACH OF MARRIAGE PROMISE; DIVORCE.

1. MARRIAGE — REMARRIAGE AFTER DIVORCE — VALIDITY. A marriage within the six months prohibited by the divorce, outside the jurisdiction, where the parties went for that purpose and immediately returned without intent to change their domicile, is void and the issue is not legitimate. *Peerless Pacific Co. v. Burckhard*..... 221

MASTER AND SERVANT:

Liens for labor and materials, see MECHANICS' LIENS.

1. MASTER AND SERVANT — INJURIES TO SERVANT — ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE. A teamster, suffering injuries in a runaway, assumes the risk of a broken seat spring, complained of to the foreman who promised to fix it after return from the trip, where there was no element of coercion, and it was a simple defect, well known to him, and he could have easily repaired it for the one trip by tying a rope or wire around the loose end of the spring; since the promise to repair did not relieve him of the duty to exercise reasonable care under the circumstances. *Mattson v. Griffin Transfer Co.* 1

2. MASTER AND SERVANT—INJURIES TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—CONSTRUCTION. The Federal employers' liability act is remedial and is to be liberally construed as to the inclusion of its beneficiaries in order to effect its remedial purpose. *Bolch v. Chicago, Milwaukee & St. Paul R. Co*..... 47

3. MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE OR ASSUMPTION OF RISKS. A question of contributory negligence, and not assumption of risks of defective appliances or place of work, under the Federal employers' liability act, arises where a switchman rode on a flat car bending over in an insecure position to uncouple cars, when he was thrown from the car through the negligence of the switch foreman in failing to turn the switch. *Bolch v. Chicago, Malwaukee & St. Paul R. Co*..... 47

MASTER AND SERVANT—CONTINUED.

4. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. It is for the jury to determine whether it was inherently dangerous for a switchman, in making a flying switch, to ride upon a flat car with his feet in the stirrup, and holding to a cleat, and bending over in an insecure position to uncouple the cars. *Bolch v. Chicago, Milwaukee & St. Paul R. Co*..... 47

MAXIMS:

Seeking and doing equity, see EQUITY.

MAYOR:

Duty to sign ordinance, see MANDAMUS, 5; MUNICIPAL CORPORATIONS, 1.

MECHANICS' LIENS:

Joinder of causes of action, see ACTIONS, 1.

1. MECHANICS' LIENS—FORECLOSURE — CONTRACT — SUBSTANTIAL PERFORMANCE—EVIDENCE—SUFFICIENCY. A mechanics' lien will not be denied for plaintiff's failure to substantially perform his contract, although there were minor imperfections which, in a $2,500 job, were fully compensated for by reducing the claim to the extent of $217, where the evidence indicated an attempt in good faith to perform the contract and to correct all imperfections pointed out, and the owners observed the character of the work and made no objections thereto at the time. *Evans v. Goist*..... 100

2. MECHANICS' LIENS—DURATION—LIMITATION—STATUTES. Rem. & Bal. Code, § 1138, providing that no mechanics' lien shall be binding for a longer period than eight months after filing unless an action be commenced within that time to foreclose the lien, is not a statute of limitations, but fixes the duration of the lien. *City Sash & Door Co. v. Bunn* 669

3. SAME—FORECLOSURE—NECESSARY PARTIES. The owner of property subject to a mechanics' lien is a necessary party to an action to foreclose the lien. *City Sash & Door Co. v. Bunn*..... 669

4. SAME—FORECLOSURE—JURISDICTION — SERVICE ON NECESSARY PARTIES. Under Rem. & Bal. Code, § 1138, limiting the life of a mechanics' lien to eights months after filing unless an action to foreclose be commenced within that time, jurisdiction can be acquired only by service, actual or constructive, upon the owner of the interest sought to be foreclosed within the statutory life of the lien; as the action is not deemed commenced until the necessary parties to its maintenance have been served. *City Sash & Door Co. v. Bunn* 669

5. MECHANICS' LIENS—FORECLOSURE — PROCEEDINGS — JURISDICTION—COMMENCEMENT OF ACTION—SERVICE OF PROCESS. Personal service of

MECHANICS' LIENS—CONTINUED.

summons must be made upon, or service by publication must be commenced against, necessary parties to an action to foreclose a mechanics' lien within the eight months limited by Rem. & Bal. Code, § 1138, as the life of the lien unless action be commenced within that time, in order to confer jurisdiction, in view of Laws 1893, p. 407, passed at the same session, providing that civil actions shall be commenced by the service of summons; although that act was amended (Rem. & Bal. Code, § 220) to provide that civil actions shall be commenced by the service of summons or the filing of a complaint, provided that unless service is had before filing the plaintiff shall cause one or more of the defendants to be served personally or commence service by publication within ninety days from the date of filing the complaint, there being no implication that the special statute was amended by the amendment of the general statute. *City Sash & Door Co. v. Bunn*..... 669

6. SAME—FORECLOSURE—CONSOLIDATION—EFFECT—PROCESS — NECESSITY. The consolidation of actions to foreclose mechanics' liens confers no jurisdiction of cross-complaints or complaints in intervention setting up independent causes of action, unless such claimants serve process upon necessary parties to the action within the time limited for the duration of the lien. *City Sash & Door Co. v. Bunn*..... 669

MENTAL SUFFERING:

As element of damages, see DAMAGES, 2, 3.

MISREPRESENTATION:

See FRAUD; VENDOR AND PURCHASER.

MISTAKE:

See ADVERSE POSSESSION.
In sentence, power to modify, see JUDGMENT, 12.

MITIGATION:

Of damages, see DAMAGES, 7.

MODIFICATION:

Of decree in divorce, see DIVORCE.
Of contract, see SALES, 2.

MORTGAGES:

Personal property, see CHATTEL MORTGAGES.
In fraud of creditors, see FRAUDULENT CONVEYANCES, 1, 3.

1. MORTGAGES—FORECLOSURE—TITLE ACQUIRED AFTER SATISFACTION. Where the actual interest of a mortgagee was fully satisfied after foreclosure, he could obtain no title by the foreclosure sale, and could convey none by assignment of the sheriff's certificate of sale. *Thomas v. Scougale* 162

MORTGAGES—CONTINUED.

2. MORTGAGES—DEED AS MORTGAGE. A deed by a stranger, without consideration, to a stranger to the debt, cannot be held to be a mortgage. *Belcher v. Young*..... 303

3. MORTGAGES—ABSOLUTE DEED AS MORTGAGE—EVIDENCE—SUFFICIENCY. An absolute deed of a half interest in real estate from M. to C. who were equal partners in the property, for an express consideration of $26,200, is shown to have been intended as a mortgage for advances made by C. to M., where it appears that, two years later, the parties had a settlement, and C. agreed to convey to M. a half interest in the property upon payment of $17,200, with interest, the contract providing that meanwhile they should be tenants in common and that upon the death of either the survivor should have the right to purchase the half interest belonging to the estate at the appraised value, it further appearing that one purpose of the original deed was to permit C. to borrow money on the property and to prevent M. from incumbering it. *McGinley v. Cannon*..... 311

4. MORTGAGES—ASSIGNEE—BONA FIDE PURCHASER — FRAUD — NOTICE. Where one purchased a mortgage and agreed to pay only on condition that the mortgage "shall be a first and valid lien" upon the property, and paid for the same after notice of suit to cancel the mortgage for fraud, he does so at his peril and is not an innocent purchaser for value. *Smith v. Greenman*..... 367

5. MORTGAGES—CONSIDERATION—RELEASE. The release of what the mortgagees in good faith believed to be a good cause of action against the mortgagors is, *prima facie*, sufficient consideration for the note and mortgage. *Zent v. Lewis*..... 651

MOTIONS:

Dismissal of appeal, see APPEAL AND ERROR, 13.
Opening or vacating judgment, see JUDGMENT, 11, 12.
Direction of verdict in civil actions, see TRIAL, 3.

MUNICIPAL CORPORATIONS:

Assessments, conclusiveness, see JUDGMENT, 8-10.
Mandamus to officers, see MANDAMUS, 5.
Speed limit for street railroads, see STREET RAILROADS, 2.
Water supply, see WATERS AND WATER COURSES, 4-10.

1. MUNICIPAL CORPORATIONS—ORDINANCES—VALIDITY—DUTY OF MAYOR — SIGNING ORDINANCES — STATUTES. An ordinance requiring the mayor of the town to sign all ordinances "immediately," and to perform such other duties as may be established by the ordinances of the town, is void as an attempted amendment of the statutes, Rem. & Bal. Code, § 7742, and 3 Id., § 7721, defining the duties of the mayor, under which it is held that it is his duty to sign valid ordi-

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nances, and also requiring him to perform such duties as may be established by statute. *State ex rel. Bothell v. Woody*..... 501

2. MUNICIPAL CORPORATIONS—STREETS—NEGLIGENT USE—COLLISION—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. An instruction as to plaintiff's contributory negligence, when his buggy was hit by defendant's automobile, is not erroneous as indicating that, to bar a recovery, it must have been the sole cause of the accident, where the jury were told that there could be no recovery if plaintiff failed to exercise reasonable care and his negligence contributed to the producing of the collision in an appreciable degree and was the efficient and proximate cause of it; it appearing that "efficient" was used synonymously with "proximate" and was intended only as stating the necessity of a causal connection between contributory negligence and the injury. *De Lys v. Powell-Sanders Co*..... 31

3. MUNICIPAL CORPORATIONS—USE OF STREETS—AUTOMOBILES—NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY. Whether defendant was guilty of negligence in leaving his automobile on a grade in such a way that it started by force of gravity and injured plaintiff, or whether his negligence was the proximate cause of the injury, are questions for the jury, where it is shown that the car would not have started if it had been properly secured, that it did start very soon after plaintiff left it, and the evidence was conflicting as to whether any one meddled with it. *Oberg v. Berg*..... 435

4. MUNICIPAL CORPORATIONS — SPECIAL ASSESSMENTS — BENEFITS — LIMIT—VALUATION FOR TAXATION. The fact that the entire assessment for a local improvement exceeded the valuation of all the property in the district for general taxation does not tend to show that the assessments exceed the special benefits conferred on the entire district or the property assessed; there being no relation between the benefits and general taxation valuations. *East Hoquiam Co. v. Hoquiam* 210

5. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS — REASSESSMENT —STATUTES—RETROACTIVE EFFECT. Laws 1915, p. 526, amending 3 Rem. & Bal. Code, § 7892-12, so as to limit assessments for local improvments in certain cities in case the estimated cost of the improvement exceeds fifty per cent of the assessed valuation of the property, has no retroactive effect and does not apply to a reassessment made after the passage of the act, where the improvement was initiated, the contract let, the work completed, the original assessment levied, and the special benefit conferred prior to the passage of the act. *East Hoquiam Co. v. Hoquiam*..... 210

6. MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENTS—BENEFITS—REVIEW BY COURTS. The confirmation of an assessment by eminent domain commissioners will not be disturbed on appeal for mere difference of opinion as to the amount of the benefits conferred,

MUNICIPAL CORPORATIONS—CONTINUED.

nor unless the record discloses that the commissioners acted arbitrarily or upon a fundamentally wrong basis. *Vancouver v. Corporation of the Catholic Bishop of Nisqually*..... 319

7. SAME—ASSESSMENTS—BENEFITS—EVIDENCE. The fact that an improvement extending a street changes a lot from a lot in the center of a two-block area to a corner lot suggests a sufficient reason for assessing benefits at $312.50, while an opposite corner lot not so changed was assessed at only $103. *Vancouver v. Corporation of the Catholic Bishop of Nisqually*..... 319

8. SAME—ASSESSMENTS—BENEFITS—USE OF PROPERTY. The fact that property assessed for benefits was used as church property is not material in determining the question of benefits conferred by the improvement. *Vancouver v. Corporation of the Catholic Bishop of Nisqually* 319

9. MUNICIPAL CORPORATIONS — IMPROVEMENTS — CHANGING CONTRACT. Where a contractor was unable to complete his contract at the original contract price, it is not a fraud upon the property owners for the city to allow him to finish the work by force account at cost and ten per cent added. *McGillivrae v. Bremerton*..... 394

10. SAME—IMPROVEMENTS — CERTIFICATE OF ENGINEER — APPROVAL OF ACCOUNT. Where there was no fraud, the certificate of the engineer and the approval of the city council as to work done by force account—cost and ten per cent added, is binding so far as the amount to be paid for the work is concerned. *McGillivrae v. Bremerton.* 394

11. SAME—IMPROVEMENTS—WARRANTS—IRREGULARITY IN ISSUE. The issuance of warrants for public work before approval by the city council is but an irregularity, and is merged in the final award when the city made final settlement. *McGillivrae v. Bremerton.* 394

12. MUNICIPAL CORPORATIONS—STREETS—GRADING—INJURY TO PROPERTY—INVASION—LIABILITY. Where, in making a street grade, plaintiff's property was invaded and covered by the slope and depreciated in value to the extent of $500, plaintiffs can recover that sum, regardless of the fact that it was an original grade of the street; and it is immaterial that, had the city avoided the invasion and all liability by building a bulkhead, the actual damage would have been greater, since there was an actual invasion and the city cannot speculate on what might have been done. *Egbers v. Seattle*... 172

13. MUNICIPAL CORPORATIONS—PUBLIC WORKS—SALE OF BONDS—INTEREST—DISCOUNT. A bond issue to pay for a water works system cannot be sold at a discount of five per cent, ostensibly to cover all commissions, attorney's fees and expenses, but which was in fact a bonus for the benefit of the buyer increasing the rate of interest which the bonds were to bear. *Spear v. Bremerton*..... 507

NAVIGABLE WATERS:

1. NAVIGABLE WATERS—BEDS AND SHORES—TITLE—GRANT BY UNITED STATES—UNMEANDERED STREAMS. The state, under Const., art. 17, § 1, being the owner of the beds and shores of navigable streams, a railroad grant of designated lots across which there was an unmeandered navigable slough does not convey the title to the shores or bed of the slough, the limit of the grant being ordinary high water where there is no meander line. *Washington Boom Co. v. Chehalis Boom Co.* 350

NEGLIGENCE:

See MASTER AND SERVANT.
Of carrier, see CARRIERS.
Of driver of automobile in striking person on highway, see HIGHWAYS.
Contributory negligence of servant as question for jury, see MASTER AND SERVANT, 3, 4.
Of person injured on street, see MUNICIPAL CORPORATIONS, 2, 3.
In operation of street car, see STREET RAILROADS.

1. NEGLIGENCE—INJURIES TO CHILDREN—CONTRIBUTORY NEGLIGENCE OF PARENT. It is not contributory negligence, as a matter of law, to send two children, aged seven and nearly four years of age, on an errand a few blocks, in broad daylight, in a residence district. *Sundstrom v. Puget Sound Traction, Light & Power Co.*..... 640

NEGOTIABLE INSTRUMENTS:

See BILLS AND NOTES.

NEWLY DISCOVERED EVIDENCE:

Ground for new trial in criminal prosecution, see CRIMINAL LAW, 5.

NEWSPAPERS:

As evidence, see FALSE IMPRISONMENT.
Libel, see LIBEL AND SLANDER.

1. NEWSPAPERS—SELECTION—EXECUTION SALES—POWERS OF SHERIFF. Under the proviso to Rem. & Bal. Code, § 582, to the effect that notice of execution sale shall be published by the sheriff in the paper selected by the plaintiff if a receipt is presented showing full payment of the publication fees, the sheriff has no power to select the paper in such a case. *State ex rel. Lewis v. Hodge*..... 487

2. SAME—SELECTION—EXECUTION SALE—"GENERAL CIRCULATION." A typical weekly country newspaper, of four pages of seven columns, containing general news, having a circulation among its paid subscribers and advertising patrons of eight hundred copies, and one hundred additional copies, is a "newspaper of general circulation," within Rem. & Bal. Code, § 582, relating to the publication of notice of execution sales. *State ex rel. Lewis v. Hodge*..... 487

NEW TRIAL:

Review on appeal, see APPEAL AND ERROR, 10, 22.
In criminal prosecutions, see CRIMINAL LAW, 5.

NON OBSTANTE:

See JUDGMENT, 1-3.

NONRESIDENCE:

Right to exemptions, see EXEMPTIONS, 3.
Effect on limitation, see LIMITATION OF ACTIONS, 1.

NONSUIT:

See DISMISSAL AND NONSUIT.
Voluntary dismissal of injunction suit, effect, see INJUNCTION, 5.
On trial, see TRIAL, 3.

NOTES:

Promissory notes, see BILLS AND NOTES.

NOTICE:

Of appeal, see APPEAL AND ERROR, 8.
Of dishonor, see BILLS AND NOTES, 3.
Record of mortgage as notice, see CHATTEL MORTGAGES, 1, 4, 6.
Loss insured against, see INSURANCE, 2, 3, 8-10.
Publication in newspapers, see NEWSPAPERS.
Purchaser of real property, see VENDOR AND PURCHASER, 1.

NUISANCE:

Abatement of assignation house, see CONSTITUTIONAL LAW, 9.

OBJECTIONS:

At former trial, when available, see EVIDENCE, 6.

OFFICERS:

Corporate officers, see CORPORATIONS.
Mandamus affecting, see MANDAMUS.
Municipal officers, see MUNICIPAL CORPORATIONS, 1.
Assessors of taxes, see TAXATION, 1, 2.

OPTION:

See PLEDGES.

ORDINANCES:

Duty of mayor to sign, see MANDAMUS, 5.
Municipal ordinances, see MUNICIPAL CORPORATIONS, 1.

PARENT AND CHILD:

See ADOPTION; BASTARDS.
Custody and support of children on divorce, see DIVORCE, 5.
Negligence of parent imputable to child, see NEGLIGENCE.
Implied contract for support, see WORK AND LABOR.

PAROL EVIDENCE:

In civil actions, see EVIDENCE, 10-11.
To vary writing, see MALICIOUS PROSECUTION, 4; TRUSTS.

PARTIES:

See QUIETING TITLE.
Persons entitled to exemptions, see EXEMPTIONS.
Persons concluded by judgment, see JUDGMENT, 6, 7.
Persons who may marry, see MARRIAGE.
Persons entitled to mechanics' lien, see MECHANICS' LIENS.
Foreclosure of lien, see MECHANICS' LIENS, 3-5.
Co-tenants, see PARTITION.

PARTITION:

1. PARTITION—ALLOTMENT—AMENDMENT—REPORT OF REFEREES. Under Rem. & Bal. Code, § 847, providing that the court may set aside the report of referees in whole or in part, or appoint new referees, the court has power to set aside the report and to direct a new allotment in a partition suit, and the interlocutory decree whereby the matter was referred is not final but may be amended as to the manner of allotting the property. *Hamlin v. Hamlin*..... 467

2. SAME—ALLOTMENT—MODE. Upon partition proceedings in which some of the parties were not interested in all the tracts drawn in controversy, a party is entitled to an allotment from the tracts in which he is interested, where such allotment can be made without injustice to the other owners. *Hamlin v. Hamlin*..... 467

PARTNERSHIP:

See JOINT ADVENTURES.

1. PARTNERSHIP—ACTIONS—EVIDENCE — INSTRUCTIONS — BROKERS — CONTRACT. In an action against two brothers, D. & E., to recover a broker's commission for negotiating the purchase of stock in a corporation which the brothers controlled as conservators of their father's estate, the fact that D., in declining to purchase, referred plaintiff to E. and the estate in the East, and that E. there entered into a tentative agreement with plaintiff agreeing to pay the commissions, is not evidence that D. and E. were partners in the purchase of the stock; and it is proper for the court to instruct the jury that there was no evidence of a partnership and that the agreement made by E. would not be binding on D. without his consent, and his liability could only be fixed by evidence of prior authorization or subsequent ratification; for even if the brothers were interested together, the rules relating to the authority of general partners would not apply to a special or limited partnership or to a joint venture. *Calhoun, Denny & Ewing v. Whitcomb*..... 128

PART PAYMENT:

Within statute of limitations, see LIMITATION OF ACTIONS.

PASSENGERS:

Carriage of, see CARRIERS.

PAUPERS:

1. PAUPERS—CARE AND SUPPORT—MEDICAL ATTENDANCE—LIABILITY OF COUNTY. A county is not liable to a physician for treating persons who are not accepted paupers, without any order from any one in authority, as plainly required by Rem. & Bal. Code, § 8377. *Guerin v. Clarke County* 242

2. PAUPERS—CARE AND MAINTENANCE—POWERS OF COMMISSIONERS—POOR FARMS. The county commissioners are, by necessary implication, authorized to purchase a county poor farm for paupers, by Rem. & Bal. Code, § 8374, vesting the commissioners with entire and exclusive superintendence of the poor; Id., § 8377, providing that they may enter into contracts for the maintenance or appoint agents to oversee and provide for paupers; and Id., § 8384, authorizing them to provide workhouses for their accommodation and employment. *Singleton v. Hamilton* 243

3. SAME. Such power is conferred by necessary implication by Id., § 3822, authorizing a county to purchase such lands as may be necessary to its corporate or administrative powers, and Id., § 3824, providing that the powers of the county can be exercised only by the county commissioners; the power to care for paupers being a corporate and administrative power. *Singleton v. Hamilton*..... 243

PAYMENT:

Bill of exchange or promissory note, see BILLS AND NOTES, 1.

Part payment within statute of limitations, see LIMITATION OF ACTIONS.

Application of, see PRINCIPAL AND SURETY.

1. PAYMENT—EVIDENCE—SUFFICIENCY. Findings that a payment of a balance of $410.82 was not made is sustained by evidence to the effect that the debtor waived a lien in order to allow the creditor to obtain advances from an insurance company, and the creditor paid $10.82 and transferred four shares of capital stock of the par value of $400, agreeing to pay ten per cent interest and retaining an option to buy it back, and upon liquidation of the corporation, substituted four shares in another company under like agreement, reciting that it was held as collateral. *Barr v. Kerfoot Investment Co.* 471

PENALTIES:

When not a tax, see DISORDERLY HOUSES.

PERSONAL INJURIES:

See ASSAULT AND BATTERY; NEGLIGENCE.
To passenger, see CARRIERS.
Damages for, see DAMAGES, 1-6.
Caused by explosives, see EXPLOSIVES.
To traveler on highway, see HIGHWAYS.
To employee, see MASTER AND SERVANT.
To person on city street, see MUNICIPAL CORPORATIONS, 2, 3.
Caused by operation of street railroad, see STREET RAILROADS.

PHYSICIANS AND SURGEONS:

Pay for attendance on paupers, see PAUPERS.
Privileged communications, see WITNESSES, 1.

PILFERAGE:

Insurance against, see INSURANCE, 1.

PLEADING:

See FRAUD, 1; LIBEL AND SLANDER.
Amendment on appeal, see APPEAL AND ERROR, 21.
Existence of custom, see CUSTOMS AND USAGES.
Statutes of sister state, see EVIDENCE, 1, 2.
Splitting causes, see JUDGMENT, 4, 5.
Of insurance, see INSURANCE.

1. PLEADING—AMENDMENT—TRIAL AMENDMENTS—COUNTERCLAIM. In an action by a depositor of goods against a warehouseman for conversion in refusing to deliver until a wrongfully surcharged lien on other goods was paid, in which the defendant interposed no counterclaim or set-off, it is error, after close of the case, to allow the defendant to amend by claiming equitable relief by way of foreclosure of his lien on the other goods and sale of the goods in suit thereunder. *Klock Produce Co. v. Diamond Ice & Storage Co*..... 67

2. PLEADING—COMPLAINT—CERTAINTY AND DEFINITENESS. It is not error to refuse to compel a complaint on a building contract to be made more definite and certain by setting out the plans and specifications. *Evans v. Goist*..... 100

3. PLEADING—AMENDMENTS—SURPRISE. Surprise is not a valid objection to the allowance of a trial amendment to the complaint, in the absence of a motion for a continuance. *Fifer v. Lynden Lumber Co.* 373

4. SAME—AMENDMENT—COMPLAINT—DEPARTURE. Upon a complaint for breach of implied warranty of a car of lumber, in that it was not "out of kiln dried lumber and not rough or torn grain or fuzzy," it is not a departure to amend by alleging further that it had knot holes, pitchy pockets, seams, streaks, and checks, and other defects violating the warranty. *Fifer v. Lynden Lumber Co*..... 373

PLEDGES:

1. PLEDGES—VALIDITY—CHANGE OF POSSESSION. In order to pledge personal property for security of a debt there must be either a change of possession or some instrument of record to evidence a constructive change of possession. *Churchill v. Miller*..... 694

2. PLEDGES—DUTY OF PLEDGEE—DEPRECIATION—LIABILITY. A pledgee of an optional contract for the purchase of a controlling interest in a railway is not liable for the depreciation in the value of the pledge by reason of the abandonment of the contract and the building of a railway of its own by the holder of the option. *Citizens Bank & Trust Co. v. Rudebeck*..... 612

3. PLEDGES—DUTY OF PLEDGEE—CONSERVATION OF PLEDGE—OPTIONAL CONTRACTS. A pledgee holding as collateral a contract for the purchase of the controlling interest in a railway is not guilty of a breach of duty in failing to conserve the collateral pledged by inforcing the contract, where it appears that the contract was purely optional in form and unenforcible except by forfeiture of payments made, the pledgee made no change in its terms, the assignee elected to abandon and forfeit the same and gave notice to that effect, and foreclosure of the pledge was thereupon commenced within three months, which conserved the rights of the pledgor as well as a more prompt foreclosure would have done. *Citizens Bank & Trust Co. v. Rudebeck*..... 612

POOR LAWS:

See PAUPERS.

POSSESSION:

Character of, to establish title, see ADVERSE POSSESSION.

Retention by grantor in fraudulent conveyance, see FRAUDULENT CONVEYANCES, 1, 5, 6.

Change of, in pledge, see PLEDGES, 1.

PRACTICE:

See APPEAL AND ERROR; CONTINUANCE; CRIMINAL LAW; DIVORCE; EVIDENCE; INJUNCTION; JUDGMENT; LIMITATION OF ACTIONS; PLEADING; TRIAL.

Prosecution of actions in general, see ACTION, 3.

PREFERENCES:

Of creditors by failing debtor, see FRAUDULENT CONVEYANCES, 3.

PREGNANCY:

Admissibility of evidence, see ABORTION, 3.

PRESCRIPTION:

Notoriety of adverse use, see EASEMENTS.

PRESENTMENT:

Of bill or note, see BILLS AND NOTES, 2, 3.

PRESUMPTIONS:

See CONSTITUTIONAL LAW, 1.
In civil actions, see EVIDENCE, 1, 2.

PRINCIPAL AND AGENT:

See BROKERS; FACTORS.
Corporate officers and agents, see CORPORATIONS.
Insurance agents, see INSURANCE, 3, 7-10.
Agency of partner for firm, see PARTNERSHIP.

1. PRINCIPAL AND AGENT—FACT OF AGENCY—EVIDENCE—ADMISSIBILITY. In an action by a dealer for the price of automobile tires sold, claimed by defendant to have been furnished under a contract with the tire company, it is not prejudicial error to strike the statement of a witness that plaintiff was "agent" of the tire company, where it was not shown that he was such agent for the purpose of carrying out the tire company's contract. *Chambers v. Independent Asphalt Paving Co.* 380

2. SAME—FACT OF AGENCY—ACTIONS BY AGENT. A dealer, having an agency for automobile tires to be sold generally at certain prices and to defendant at a discount, may maintain an action in his own name for the price of tires purchased from the company and paid for by him and sold to the defendant, it not appearing that he was the agent of the company for any other purpose. *Chambers v. Independent Asphalt Paving Co.* 380

3. PRINCIPAL AND AGENT—APPARENT AUTHORITY—ACTIONS—INSTRUCTIONS. An instruction that a principal owes the duty to use "reasonable care" to oversee the acts of an agent with reference to his business is not prejudicial where the real point was that he was bound by the apparent authority which he knew, or reasonably should have known, the agent was assuming, and the same was covered by other instructions. *Mott Iron Works v. Metropolitan Bank* 655

4. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—EMPLOYMENT AND DISCHARGE. Authority by a "representative" of a vaudeville circuit to employ actors does not imply an authority to discharge them. *Amann v. Pantages* 271

5. SAME—DISCHARGE BY AGENT—AUTHORITY—LIABILITY OF PRINCIPAL—TENDER OF SERVICE. Actors employed by a "representative" of a vaudeville circuit cannot rely upon a "discharge" by a brother of the representative employed in his office and maintain an action for breach of contract against the employer, where they made no effort

PRINCIPAL AND AGENT—CONTINUED.

to communicate with the employer or any tender of their services. *Amann v. Pantages* 271

6. SAME—CONTRACT OF EMPLOYMENT—BREACH—DISCHARGE — TENDER OF SERVICES. Upon employment of actors in New York for services in a vaudeville circuit to open in a city in a Pacific coast state, tender of services in New York is bad, especially when accompanied by demand for transportation not provided for in the contract. *Amann v. Pantages* 271

7. PRINCIPAL AND AGENT—SALES ON COMMISSION—BREACH OF CONTRACT. The defective nature of machines to be sold under an exclusive selling agency contract is a breach of the contract entitling the agent to damages. *Kennedy v. Meilicke Calculator Co*..... 238

8. SAME—SALES ON COMMISSION—BREACH OF CONTRACT—MEASURE OF DAMAGES. On breach of contract for an exclusive selling agency, by reason of the defective nature of the machines, the agent is entitled to recover traveling expenses paid out in attempting to sell the defective machines; but not the expenses of a voluntary trip taken for the purpose of securing the contract. *Kennedy v. Meilicke Calculator Co.* 238

9. PRINCIPAL AND AGENT—CONTRACTS OF AGENT—EMPLOYMENT OF FACTOR—RATIFICATION—EVIDENCE—SUFFICIENCY. There was not only a contract by the sales agent of the defendant, a paint company, making plaintiff its agent for the sale of paint on commission, but a ratification of the sales agent's agreement by acceptance of the proceeds thereunder, where the preponderance of the evidence was to the effect that the sales agent took up the matter in response to direct communications between the plaintiff and defendant, entered into the contract, assisted plaintiff in making certain sales agreed to be applied under the contract, and figured plaintiff's commissions on such sales, orders for which were filled directly by the defendant at the consumer's price, while plaintiff's order was filled at such price less the agreed upon commissions, and it appeared that defendant collected the full price for such sales, and in a letter in regard to the same stated to plaintiff that any credits "due for commissions are not payable to you until we have been paid by the people to whom we made direct shipment." *Lindeman Lumber Co. v. Remolite Paint Co*..... 26

PRINCIPAL AND SURETY:

See INDEMNITY; BAIL.

Liabilities of sureties on bonds in legal proceedings, see INJUNCTION.

1. PRINCIPAL AND SURETY—ACTION ON BOND—JUDGMENT—ON STIPULATION—PRIMARY LIABILITY FOR LIENS—RIGHTS OF SURETY—POSTPONEMENT OF LIABILITY. In an action upon a subcontractors' bond where it appeared that the subcontractors and their surety were primarily

PRINCIPAL AND SURETY—CONTINUED.

liable in any event to discharge certain lien claimants whom the subcontractors had failed to pay, and the parties stipulated for present judgment for the amount of the established liens, pending the litigation of collateral issues between the contractor and subcontractors, the surety cannot, after entry of such judgment pursuant to stipulation, complain that the collateral issues between the contractor and subcontractors have not yet been determined or the ultimate liability of its principal fixed, or seek any postponement of its liability on the stipulated judgment until that event has transpired; since the surety's liability for the amount of the liens attached immediately upon breach of the bond, and equity will not permit postponement of the payment of the liens pending the trial of collateral issues, and, furthermore, the surety has its remedy over against the subcontractors given by statute and may avail itself of the benefit of any judgment finally entered. *Puget Sound Bridge & Dredging Co. v. Guardian Casualty & Guaranty Co.*..... 96

2. SAME—RIGHTS OF CREDITORS—ASSIGNMENTS BY CONTRACTOR—RESCISSION. An assignment directing the state and county auditors to pay all money due or that will become due from time to time for work performed on certain highway work by a subcontractor may be rescinded by the principal contractor after the subcontractor defaulted and gave notice that it could not perform the contract. *Fidelity & Deposit Co. v. Northwestern Nat. Bank of Bellingham.* 179

3. SAME — RIGHTS OF CREDITORS — ADVANCES TO CONTRACTOR — PAYMENTS—FAILURE TO APPLY. Where a bank advanced money to a subcontractor on highway work, taking notes therefor, and received warrants on the work for more than sufficient to pay the notes, but failed to apply the same thereto and allowed the same to be checked out on general account upon other contracts, it cannot claim reimbursement from the surety on the bond of the subcontractor after the latter's default. *Fidelity & Deposit Co. v. Northwestern Nat. Bank of Bellingham*..... 179

4. PRINCIPAL AND SURETY—BOND ON PUBLIC WORKS—RIGHTS OF CREDITORS—ADVANCE TO CONTRACTOR—APPLICATION OF PAYMENTS. Where a surety company on the bond of a subcontractor on highway work was obliged to pay debts and take over the work, and afterwards earned money in the performance of the uncompleted work, before a bank that had made advances to the subcontractor can claim reimbursement from the surety company, it must show that all the money advanced was used by the subcontractor in that particular work; and it has no claim on the money earned by the surety where a substantial part of the advances were used in payment of salaries of officers and other items not entering into the performance of the work. *Fidelity & Deposit Co. v. Northwestern Nat. Bank of Bellingham* 179

PRINCIPAL AND SURETY—CONTINUED.

5. PRINCIPAL AND SURETY—CONTRACTOR'S BOND—LIABILITY FOR SUPPLIES—RENT OF TEAMS—BURDEN OF PROOF. In an action upon a contractor's bond to pay for supplies actually furnished and used in the construction of the contract, seeking to recover the reasonable rental value of teams, the surety is liable only for the number of days that the teams were actually employed on the work, the burden of proof as to which is upon the plaintiff. *State Bank of Seattle v. Ruthe* 636

PRIORITIES:

Of mortgages, see CHATTEL MORTGAGES.
Of tax title, see TAXATION, 6.

PRIVILEGED COMMUNICATIONS:

Disclosure by witness, see WITNESSES, 1.

PROBABLE CAUSE:

See MALICIOUS PROSECUTION, 2.

PROCESS:

See INJUNCTION, 4.
Commencement of actions, see ACTIONS, 3.
On appeal, see APPEAL AND ERROR, 2, 8; RAILROADS, 4. 5.
Quashing service of injunction order, see INJUNCTION, 4.
Personal service, as to foreign judgments, see JUDGMENTS, 14.
Service, time for, see MECHANICS' LIENS, 2-6.
Foreclosure of tax certificate, see TAXATION, 7.

PROMISE OF MARRIAGE:

See BREACH OF MARRIAGE PROMISE.

PROMISSORY NOTES:

See BILLS AND NOTES.

PROOF:

Of loss insured against, see INSURANCE, 2, 3, 8-10.

PROPERTY:

See FISH.
Adverse possession, see ADVERSE POSSESSION.
Constitutional guaranties of rights of property, see CONSTITUTIONAL LAW, 3, 4, 8, 9.
Taking or damaging for public use, see EMINENT DOMAIN.

PROSTITUTION:

See DISORDERLY HOUSES.
Abatement of house, see CONSTITUTIONAL LAW, 9.

PROSTITUTION—CONTINUED.

1. PROSTITUTION—INFORMATION—CERTAINTY. In view of Rem. & Bal. Code, § 2057, requiring the information to be direct and certain as to the crime charged and the particular circumstances thereof, an information charging the accused with being "wilfully and unlawfully a common prostitute," does not sufficiently state the facts constituting an offense under an ordinance making it unlawful to be a common prostitute or to habitually practice prostitution and have indiscriminate sexual intercourse with men for hire and to be commonly known to be a common prostitute; the ordinance being intended to reach only the practice of prostitution for hire, while one may be a common prostitute without practicing for hire. *State v. Bryant* 20

PROVINCE OF COURT AND JURY:

In civil actions, see TRIAL, 3, 5.

PROXIMATE CAUSE:

See DAMAGES, 1, 2.

PUBLICATION:

In newspapers, see NEWSPAPERS.

PUBLIC IMPROVEMENTS:

By municipalities, see MUNICIPAL CORPORATIONS, 4-13.

PUBLIC LANDS:

Beds of streams, see NAVIGABLE WATERS.

PUBLIC SERVICE COMMISSION:

Powers as to the water supplied to cities and private parties, see WATERS AND WATER COURSES, 3.

PUBLIC USE:

Taking property for public use, see EMINENT DOMAIN.

PUBLIC WORKS:

Contractors' bonds, see PRINCIPAL AND SURETY.

QUANTUM MERUIT:

Joinder of causes of action, see ACTIONS, 1.

QUIETING TITLE:

Conditioned on doing equity, see EQUITY.

1. QUIETING TITLE—RIGHT OF ACTION—VOID LIEN. Under Rem. & Bal. Code, § 785, an action to quiet title may be maintained to remove the cloud of a judgment lien against community property, although the judgment was against the husband for tort and not enforcible against the property; since the statute authorizes the action by any person claiming an interest where the invalidity of the apparent lien can only be shown by extrinsic evidence. *Wilson v. Stone*.. 365

RAILROADS:

Liability for trespassing animals for want of fence, see ADJOINING LANDOWNERS.
Liability under Federal employer's act, see COMMERCE.
As employers, see MASTER AND SERVANT.
In city streets, see STREET RAILROADS.
Taxation, see TAXATION, 1, 2.

1. RAILROADS—CONSTRUCTION—LIENS — BOND OF CONTRACTOR — STATUTES—TITLE AND SUBJECTS. Under Rem. & Bal. Code, § 1129, providing for liens for labor and supplies furnished in the construction of certain structures, including a railroad, with a proviso that the railroad company shall give a bond for the protection of laborers and materialmen, "which bond shall be filed . . . in the office of the county auditor" and that if the company fails to take such bond it shall be liable to persons furnishing labor and materials, the bond is made security for what the prior portion of the section made lienable and relieves the railway property from the lien; and no other construction would be constitutional, since the title of the act refers only to the enforcement of liens. *Du Pont De Nemours Powder Co. v. National Surety Co.*..... 227

2. SAME — BOND OF CONTRACTOR — ACTIONS BY CREDITORS — NOTICE OF LIEN. An independent action on such bond as a statutory bond cannot be maintained except in the manner authorized by the statute for the enforcement of the lien, notice of which must be given by the filing of a lien notice as required by § 1134. *Du Pont De Nemours Powder Co. v. National Surety Co.*..... 227

3. SAME—BOND BY CONTRACTOR—CREDITORS—COMMON LAW ACTION. There being no privity, creditors who failed to give notice of lien cannot maintain a common law action upon a bond given by a railroad company under Rem. & Bal. Code, § 1129, in lieu of the statutory lien for labor and supplies furnished in the construction of the road; the object of the bond under the statute being more to relieve the railroad property of the lien than for the protection of creditors of the company. *Du Pont De Nemours Powder Co. v. National Surety Co.*..... 227

4. RAILROADS — ACTIONS — PROCESS—AGENT FOR SERVICE. The issuance of coupon tickets and through bills of lading for nonresident railroad companies does not make a resident railroad company an agent of the nonresident company for the purpose of service of process. *Royce v. Chicago & Northwestern R. Co.*..... 378

5. RAILROADS—SERVICE OF PROCESS—AGENTS. The fact that a soliciting agent was advertised as the "General Agent" of defendant railway company does not authorize the service of process upon him, under Bal. Code, § 4875, subd. 4, authorizing service upon any agent, where he derived no actual authority from the defendant, which had no interest in his office, and his reports were made to, and his

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salary was paid by, other companies. *Royce v. Chicago & Northwestern R. Co.* 378

6. RAILROADS—RIGHT OF WAY—DUTY TO FENCE—STATUTES. A railroad company is not liable for damages done by trespassing cattle that strayed from its unfenced right of way to and upon the lands of an adjoining landowner, under Rem. & Bal. Code, §§ 8730, 8731, making the killing of stock upon an unfenced railroad right of way *prima facie* evidence of negligence, since "stock killing" statutes have no application to such a case. *Hanson v. Northern Pac. R. Co.* 516

RATIFICATION:

Of acts of corporate officers, see CORPORATIONS, 1, 3.
By wife of husband's contract, see HUSBAND AND WIFE, 1.
Of acts of partner, see PARTNERSHIP.
Of acts of agent, see PRINCIPAL AND AGENT, 9.

REAL ESTATE AGENTS:

See BROKERS.

REASSESSMENT:

Conclusiveness of first, see JUDGMENT, 8-10.

RECEIPTS:

Warehouse receipts, see WAREHOUSEMEN.

RECEIVERS:

In partition proceedings, see PARTITION.

RECITALS:

In judgment, see JUDGMENT, 1.

RECORDS:

See CHATTEL MORTGAGES, 1, 4, 6; JUDGMENT, 1.
On appeal, see APPEAL AND ERROR, 9-12.
Recording acts, rights of creditors, see FRAUDULENT CONVEYANCES, 5, 6.

1. RECORDS—RECORDING PAPERS—DAMAGES—CAUSING CLOUD ON TITLE. A broker is not liable in damages for causing the recording of a contract relating to his commissions upon effecting an exchange of properties, on the theory that it creates a cloud on title, as no legal rights are violated. *Littlefield v. Bowen* 286

RED LIGHT LAW:

See DISORDERLY HOUSES.
Validity of, see CONSTITUTIONAL LAW, 9.

REFEREES:

Reports of, see PARTITION.

REGISTRATION:

Of chattel mortgages, see CHATTEL MORTGAGES, 1, 4, 6.

RELEASE:

1. RELEASE—IMPEACHING—EVIDENCE — SUFFICIENCY. The testimony to overcome a written release of damages must be clear and convincing, especially where the signer "was at himself;" and is insufficient, where it appears that he was intelligent, sought the settlement, and then asked for a life job, and he alone testified that he signed under a misunderstanding and promise of a life job, two witnesses testifying that the release was read and explained to him. *Spratt v. Northern Pac. R. Co*..... 592

RESCISSION:

Of contract for sale of land, see VENDOR AND PURCHASER.

RES JUDICATA:

See JUDGMENT, 4-10.

RESULTING TRUSTS:

See TRUSTS, 2.

REVIEW:

See APPEAL AND ERROR.
In criminal prosecution, see CRIMINAL LAW, 6-8.
On certiorari, see MANDAMUS, 1, 2.

RIGHT OF WAY:

Of railroads, see RAILROADS, 1-5.

RISKS:

Assumed by employee, see MASTER AND SERVANT.

ROADS:

See HIGHWAYS.
Streets in cities, see MUNICIPAL CORPORATIONS.

RULES:

Of supreme court, dismissal of appeal, see APPEAL AND ERROR, 13.

SALARY:

Review of order fixing, see APPEAL AND ERROR, 2.

SALES:

Election by conditional seller, see ELECTION OF REMEDIES.
Recording bill of, see FRAUDULENT CONVEYANCES, 5, 6.

SALES—CONTINUED.

On foreclosure of mortgage, see MORTGAGES, 1.
Of municipal bonds, validity, see MUNICIPAL CORPORATIONS, 13.
On commission, breach of contract, see PRINCIPAL AND AGENT, 7-9.
By agents, see PRINCIPAL AND AGENT, 9.
Of realty, see VENDOR AND PURCHASER.
Of water rights, see WATERS AND WATER COURSES, 3-10.

1. SALES—CONTRACT—CONSTRUCTION—QUALITY OF GOODS. A contract for the sale of first government grade New Zealand creamery butter with government certificate attached to bill of lading, calls for grading in New Zealand and not for a Seattle or American certificate or grade. *Klock Produce Co. v. Robertson*..... 260

2. SALES—CONTRACT—MODIFICATION—ACQUIESCENCE IN DEPARTURE—EQUITABLE ESTOPPEL. Where, upon the sale of first government grade New Zealand butter under that government's certificate, without any provision for an American inspection or certificate, the third shipment, though certified, was found to be largely off grade, the conclusiveness of the foreign government certificate as to grade is waived and the seller is estopped to insist upon the original terms of the contract, where he acquiesced in the buyer's contention that it was off grade, and departed from the original contract by agreeing that the defective boxes be set aside and sold at prices agreed to by the seller, and they were accounted for on that basis. *Klock Produce Co. v. Robertson*..... 260

3. SAME. The same would be true as to the fifth and last shipment which was partly off grade, and as to an agreement to arbitrate the differences, where the seller acquiesced in the claim that part was off grade, and fixed the prices at which it was sold by the buyer, who accounted for such sales accordingly. *Klock Produce Co. v. Robertson* 260

4. SALES—SALE OF MACHINERY—IMPLIED WARRANTY—SALE BY SAMPLE. Upon the purchase of a specified kind of impeller for use on a second-hand pump, upon the statement of plaintiff, a dealer, that he could not repair the old impeller and that defendant ought to buy a new one, there is no implied warranty that the new impeller will make the old pump work satisfactorily; as the sale was by sample, with implied warranty only that it was of the kind ordered. *Perine Machinery Co. v. Buck*..... 344

5. SAME—SALE OF MACHINERY—ACTION FOR PRICE—OFFSETS. In such a case, where no defects in the impeller were shown and the buyer did not offer to return it when it failed to work satisfactorily, and made no objection to bills rendered, he cannot, in an action for the price, offset expenses on other parts of the pump in attempting to make it work or for loss of profits on a contract while attempting to use it. *Perine Machinery Co. v. Buck*..... 344

SALES IN BULK:

Insurable interest in stock sold, see INSURANCE, 4.

SCHOOLS AND SCHOOL DISTRICTS:

Tuition fees, see COLLEGES AND UNIVERSITIES; CONSTITUTIONAL LAW, 3.

SENTENCE:

Power to modify, see JUDGMENT, 12.

SEPARATE ESTATE:

Of spouse, see HUSBAND AND WIFE, 3.

SERVITUDES:

See EASEMENTS.

SET-OFF AND COUNTERCLAIM:

Pleading matter of set-off or counterclaim, see PLEADING, 1.
In action for price of goods sold, see SALES, 5.

SETTLEMENT:

See PAYMENT.
Of claim for personal injuries, see RELEASE.

SHERIFFS AND CONSTABLES:

Compelling levy by, see MANDAMUS, 6.
Selection of newspaper, see NEWSPAPERS.

SHORE LANDS:

See NAVIGABLE WATERS.

SPEED LIMIT:

See STREET RAILROADS, 2.

SPLITTING:

Causes of action, see JUDGMENT, 4, 5.

STATEMENT:

Of case or facts for purpose of review, see APPEAL AND ERROR, 9, 10.

STATES:

Legislative power, see CONSTITUTIONAL LAW.
Estoppel against, see ESTOPPEL.
Lands of, beds of streams, see NAVIGABLE WATERS.

STATE UNIVERSITY:

Tuition at, see COLLEGES AND UNIVERSITIES; CONSTITUTIONAL LAW, 3.

STATUTES:

See BASTARDS; HIGHWAYS; HUSBAND AND WIFE, 3; MANDAMUS; MECHANICS' LIENS; PAUPERS.
Presumption, see CONSTITUTIONAL LAW, 1.
Judicial notice of, see EVIDENCE, 1, 2.
Indefiniteness, see FACTORS.
Repeal, see FISH.
Statute of frauds, see FRAUDS, STATUTE OF.
Of limitation, see LIMITATION OF ACTIONS.
Federal employers' liability act, see MASTER AND SERVANT, 2-4.
Conflicting ordinance, see MUNICIPAL CORPORATIONS, 1.
Retroactive effect, see MUNICIPAL CORPORATIONS, 5.
Assessments for public improvements, see MUNICIPAL CORPORATIONS, 4-11.
Title and subjects of act, see RAILROADS, 1.
Equality of assessments, see TAXATION, 8.
Partial invalidity, see TAXATION, 10.
Regulating warehouse receipts, see WAREHOUSEMEN.
Public water supply, see WATERS AND WATER COURSES, 5, 8.

1. STATUTES—SUBJECTS AND TITLES. The provision in the jitney bus act, Laws 1915, p. 227, requiring certain carriers to give a surety bond before engaging in business, is germane to and sufficiently included within the title "an act relating to and regulating common carriers of passengers upon public streets, roads and highways." *State v. Seattle Taxicab & Transfer Co*..... 416

2. STATUTES—PARTIAL INVALIDITY—EFFECT. Since it cannot be said that Rem. & Bal. Code, § 7033 *et seq.*, regulating commission merchants, would have been passed without any definition of the persons to whom the act was to be applied, the indefiniteness of the definition of commission merchants pervades the act and renders the whole statute void. *State v. Powles & Co*..... 112

STENOGRAPHERS:

Report, as evidence, see EVIDENCE, 6.

STIPULATIONS:

For judgment, see PRINCIPAL AND SURETY, 1.

STOCK:

Fence law, effect of, see RAILROADS, 6.

STORAGE:

See WAREHOUSEMEN.

STREET RAILROADS:

1. STREET RAILROADS—OPERATION—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE. It is contributory negligence, as a matter of law, for the driver of a horse and wagon, after looking back and ob-

STREET RAILROADS—CONTINUED.

serving the approach of a street car a block away, running fast, to pursue a course parallel to the street car track to the next crossing, and to turn abruptly in front of the car without looking. *Fowler v. Seattle* 375

2. STREET RAILROADS—INJURY TO PERSONS ON TRACKS—SPEED LIMIT. The speed limit for street cars in a "settled residential district" includes a locality near a suburban business district, although there were no houses immediately abutting on the street for about a block and a half at the place where an accident occurred. *Sundstrom v. Puget Sound Traction, Light & Power Co*..... 640

3. SAME—INJURY TO PERSONS ON TRACKS—NEGLIGENCE—OPERATION OF CARS—EVIDENCE—QUESTION FOR JURY. The negligence of a motorman in running down a child of tender years is a question for the jury, where he saw the child and his older sister in the act of crossing the street when half a block away, at which time he saw the older child cross the track, and the younger child stop near the track, he was exceeding the speed limit and going 15 to 16 miles an hour, approaching a curve for which he started to slow down when two or three car lengths away from the child, and was going 12 to 15 miles an hour when the child, only six or seven feet from the rails, darted in front of the car. *Sundstrom v. Puget Sound Traction, Light & Power Co*..... 640

4. SAME. The fact that the car could not have been stopped in time, after the child started to cross the tracks, does not establish due care in approaching the child, where the motorman saw him pause near the track. *Sundstrom v. Puget Sound Traction, Light & Power Co*..... 640

5. SAME—INJURY TO PERSONS ON TRACKS—NEGLIGENCE—DEFECTIVE FENDER—QUESTION FOR JURY. Negligence in failing to equip a street car with a sufficient fender, is a question for the jury, where there was evidence that the fender stood eighteen inches above the rails, and that it was practical to equip it with one standing six inches above the rails, which might have saved the child if, as testified, he had started to rise when the car struck him. *Sundstrom v. Puget Sound Traction, Light & Power Co*..... 640

STREETS:

See HIGHWAYS; MUNICIPAL CORPORATIONS.

SUBSEQUENT PURCHASER:

See FRAUDULENT CONVEYANCES, 2.

SUIT MONEY:

See DIVORCE, 6, 7.

SUMMONS:

See ACTIONS; MECHANICS' LIENS, 4; TAXATION, 7.

SUPPORT:

Of pauper, see PAUPERS.
Implied contract, see WORK AND LABOR.

SURCHARGING:

For goods stored, see WAREHOUSEMEN.

SURETYSHIP:

Surety bonds, see CARRIERS, 5, 6; PRINCIPAL AND SURETY.

SURFACE WATERS:

See WATERS AND WATER COURSES, 2.

SURPRISE:

As ground for amendment, see PLEADING, 3.

TAXATION:

Action involving validity, see APPEAL AND ERROR, 1.
Penalty in red light law, not a tax, see DISORDERLY HOUSES.
Powers of, see TAXATION, 1, 2, 11.

1. TAXATION—PROPERTY SUBJECT—RAILROAD ROLLING STOCK—STATUTES—CARS OF FOREIGN COMPANY—SITUS. Where a foreign railroad company had an operating agreement with a company having a railroad line in this state, whereby three of its through eastern passenger cars were, each day, taken at the state boundary line and run through several counties of this state to the city of S. and returned, under a profit sharing agreement, the cars are assessable for taxation as the property of the foreign company, either as operating railroad property, or as ordinary personal property, under Rem. & Bal. Code, § 9142, subd. 3, providing that "property of the railroad company" as used in the chapter relating to taxation "shall include all . . . rolling stock equipment . . . used or employed in the operation of the railroad or in conducting its business," and 3 Id., § 9152, providing that "the rolling stock and other movable property belonging to any railroad company or corporation, shall be considered personal property and shall be assessed and taxed as such;" since the first section, giving the state tax commissioners power to assess railroad operating property, is not confined to railroad companies having lines in this state, and under the last section, the foreign company maintained the situs of the cars in this state, although the same three cars are not continuously in the state. *Canadian Pac. R. Co. v. King County*..... 38

2. SAME—APPORTIONMENT TO COUNTIES. The state tax commission has supervisory power to direct the assessment and distribution of

TAXATION—CONTINUED.

a railroad company's rolling stock ratably among the several counties in which it is used. *Canadian Pac. R. Co. v. King County*.. 38

3. TAXATION—ASSESSMENT—EXCESSIVENESS—BURDEN OF PROOF — EVIDENCE—SUFFICIENCY. In an action to recover excessive taxes, the burden of showing that the assessment was so grossly in excess of its actual value as to constitute a constructive fraud or arbitrary action is upon the taxpayer, and requires evidence of the most clear and convincing character, and findings based on the presumption of proper valuation by the taxing board acting in a quasi judicial capacity will be sustained on appeal, although four witnesses of ordinary qualifications gave it as their opinion that the lands averaged about one-half of the assessed value. *Heuston v. King County*..... 200

4. SAME — EXCESSIVENESS — INEQUALITY — EVIDENCE — SUFFICIENCY. That tide lands on the mainland are assessed in excess of other lands of like character cannot be shown by comparing the same with tide lands upon an island several miles distant on the other side of Puget Sound. *Heuston v. King County*..... 200

5. TAXATION—LIENS—FORECLOSURE—CERTIFICATES OF DELINQUENCY—RIGHTS OF HOLDER—FORFEITURE. Under Rem. & Bal. Code, § 9262, requiring the purchaser of a tax certificate of delinquency to pay subsequent taxes on pain of forfeiture of all rights to any subsequent purchaser who must redeem the prior certificates, with a proviso excepting counties or municipalities, a county need not redeem from prior certificates or liens, holders of which lose all lien rights by failing to pay subsequent taxes. *Whatcom County v. Black*..... 280

6. SAME—TAX LIENS—PRIORITY. As the latest tax lien is superior to liens prior in time, so far as the taxing body is concerned, a county foreclosure for one year only wipes out all prior delinquent taxes. *Whatcom County v. Black*..... 280

7. SAME—TAX LIENS—FORECLOSURE—NOTICE. Upon a county tax foreclosure, no personal service is required, where notice of publication is given in the manner required by Rem. & Bal. Code, § 9257, providing for notice "exclusively by publication in one general notice, describing the property the same as described on the tax rolls." *Whatcom County v. Black*..... 280

8. TAXATION—UNIFORMITY—ASSESSMENTS—VALUATION — STATUTES — CONSTITUTIONAL PROVISIONS. The assessment of property for taxation at fifty per cent of its value, as required by 3 Rem. & Bal. Code, § 9112, does not violate the constitutional provisions (Const., art. 7, § 1, and Id., § 2, as modified by the third amendment) requiring all property to be taxed in proportion to its value, and requiring the legislature to provide by law a uniform and equal rate of assessment and taxation on all property according to its value in money so that every one shall pay a tax in proportion to the value of his or her property; since the fundamental idea is equality and uni-

TAXATION—CONTINUED.

formity and the constitution is complied with by assessment of all property at a uniform rate. *State ex rel. Board of Tax Com'rs v. Cameron* 407

9. SAME—UNIFORMITY—ASSESSMENTS—VALUATION—EXEMPTIONS. The proviso to such amendment to the constitution authorizing the legislature to exempt personal property to the amount of $300 for each head of a family liable to assessment and taxation permits a deduction only of personal property to the actual value of the amount of the exemption and not an exemption of $300 from the value placed on the property for the purpose of assessment. *State ex rel. Board of Tax Com'rs v. Cameron*..... 407

10. SAME—STATUTES—PARTIAL INVALIDITY. Such proviso, if construed as allowing a reduction of $300 from the valuation placed on the property for the purposes of assessment, may be rejected as repugnant to the constitution without affecting the validity of the balance of the act, as the same is complete in itself; and leads to the conclusion that the proper procedure in making the deduction is to exempt property of the actual value of $300. *State ex rel. Board of Tax Com'rs v. Cameron*..... 407

11. SAME — ASSESSMENT—EXEMPTIONS—VALUATIONS—POWER OF STATE TAX COMMISSIONERS. The board of state tax commissioners has power to order the county assessors, in allowing exemptions to the head of a family, to deduct property of the actual value of $300, rather than to deduct $300 from the value placed on the property for the purpose of assessment; in view of Rem. & Bal. Code, § 9098, giving the board power to exercise general supervision over the system of taxation throughout the state and to exercise supervision over assessors and county boards of equalization, to the end that all taxable property shall be placed upon the assessment rolls and equalized as between the different counties, etc. *State ex rel. Board of Tax Com'rs v. Cameron*..... 407

TENANCY IN COMMON:

Partition between tenants in common, see PARTITION.

1. TENANCY IN COMMON—LEASE TO COTENANT—LIABILITY FOR RENT—TITLE—MERGER. Where a tenant in common, holding the full legal title, made a lease and afterwards purchased the lease on his own account and thereafter held exclusive possession under the lease, accounting for the stipulated rents during his lifetime, the lease was not merged, and his estate, holding over, is properly charged with the rents stipulated in the lease. *McGinley v. Cannon*..... 311

TENDER:

Of services, see PRINCIPAL AND AGENT, 6.
Of deed, see VENDOR AND PURCHASER, 2.

TENDER—CONTINUED.

1. TENDER—WAIVER. Where a transfer by one party to an exchange of properties was refused by the other, tender of a deed is not necessary. *Littlefield v. Bowen*..... 286

THEFT:

Insurance against, see INSURANCE.

TIME:

For performance of contract, see EXCHANGE OF PROPERTIES.

TITLE:

See ADVERSE POSSESSION; PARTITION.
Evidence of, see EVIDENCE, 5.
To beds and shores, see NAVIGABLE WATERS.
Removal of cloud, see QUIETING TITLE.
Statutes, see STATUTES.

TORTS:

See ASSAULT AND BATTERY; CONSPIRACY; FRAUD; LIBEL AND SLANDER; MALICIOUS PROSECUTION; TROVER AND CONVERSION.
Action in contract or tort, joinder of, see ACTIONS, 2.
Liability of employer, see CARRIERS, 3, 4.
Of husband, see HUSBAND AND WIFE, 2.
Of employers, see MASTER AND SERVANT.
Of city, see MUNICIPAL CORPORATIONS, 12.

TRESPASS:

Animals on unfenced lands, see ADJOINING LANDOWNERS.
To the person, see ASSAULT AND BATTERY; FALSE IMPRISONMENT.
Ejection of trespasser, see CARRIERS, 3, 4.
By straying cattle, liability of railroad, see RAILROADS, 6.

TRIAL:

For personal injuries, see CARRIERS; MASTER AND SERVANT; MUNICIPAL CORPORATIONS, 2, 3; STREET RAILROADS, 3-5.
Exceptions or objections for purpose of review, see APPEAL AND ERROR, 5-7.
Review of verdicts, see APPEAL AND ERROR, 31.
Harmless error in instructions, see APPEAL AND ERROR, 35.
Instructions in action for commissions, see BROKERS, 1-4.
Contributory negligence of passenger as question for jury, see CARRIERS, 10.
Question for jury as to employment, see COMMERCE.
Of criminal prosecution, see CRIMINAL LAW, 3-5.
Comment on evidence, see BROKERS, 3; CRIMINAL LAW, 3.
Motion *non obstante veredicto*, see JUDGMENT, 1-3.
Question for jury and instructions, see MALICIOUS PROSECUTION, 2-4.
De novo, see MANDAMUS, 2.

TRIAL—CONTINUED.

Instructions in action for commissions, see PARTNERSHIP.
Instructions as to duty of principal, see PRINCIPAL AND AGENT, 3.
Instructions in action for conversion, see TROVER AND CONVERSION, 3.

1. TRIAL — ISSUES AND FINDINGS — PROPOSED FINDINGS — PROPRIETY. Where a chattel mortgage foreclosure was transferred to the superior court by an injunction suit, a finding in an action on the injunction bond that $350 was expended in the injunction suit is not contradicted, but merely amplified, by a proposed finding that said sum was not expended in contesting the injunction but was incurred in the foreclosure action, which was but another name for the injunction suit. *Kitsap County Bank v. United States Fidelity & Guaranty Co.* 12

2. SAME. In such a case, a proposed finding that the mortgagee acquired possession of the mortgaged property by an independent action in replevin impliedly under an independent title, supported by the evidence, is material and should have been made, when not contradictory to the other findings made and unexcepted to. *Kitsap County Bank v. United States Fidelity & Guaranty Co.* 12

3. TRIAL—ISSUES—SUBMISSION TO JURY.— PROVINCE OF COURT. The practice of submitting a case to the jury, although the court is convinced that there is no fact to sustain the verdict, is not to be discouraged; and so doing does not waive the court's judicial function of determining whether any lawful judgment can be entered upon an undisputed state of the record. *Mattson v. Griffin Transfer Co.* 1

4. TRIAL—INSTRUCTIONS—COMMENT ON EVIDENCE—INSTRUCTIONS AS A WHOLE. While an instruction, standing alone, might be a comment on the evidence, it must be considered in connection with the other instructions and not taken from its setting. *Low v. McDonald* 122

5. TRIAL — WITNESSES — CREDIBILITY—COMMENT BY COURT—INSTRUCTIONS—ARGUMENT OF COUNSEL. A nonresident defendant who had not been served and who had not appeared, but testified for his codefendant, is not singled out and given special standing before the jury as to his credibility by instructions and rulings of the court to the effect that his nonappearance as a party was not to be considered as affecting his credibility or to be considered to his prejudice; and the court properly restrained argument inviting the jury to draw the inference that his nonappearance as a party was a circumstance to be considered by the jury in judging his credibility. *Calhoun, Denny & Ewing v. Whitcomb* 128

6. TRIAL—MISCONDUCT OF COUNSEL—INSTRUCTIONS. In an action for personal injuries and false arrest and imprisonment, the opening statement, and the persistently asking of questions, bringing before the jury the irrelevant fact that one of the defendants was arrested

TRIAL—CONTINUED.

and convicted of making an assault upon the plaintiff, may easily be so highly prejudicial as not to be curable by instructions. *Duval v. Inland Navigation Co* 149

7. TRIAL—INSTRUCTIONS—ACCEPTED FACTS. It is error to refuse a requested instruction that the jury accept specified material facts which were not disputed. *Washington Boom Co. v. Chehalis Boom Co.* 350

8. TRIAL—ISSUES—DIRECTION OF VERDICT. In an action on an insurance policy in which plaintiff's valuation of the goods was denied by the defendant, but defendant failed to put in any proof upon the announcement of a directed verdict for plaintiff in a reduced sum, the court would not be justified in directing a verdict for the face of the policy, as defendant was entitled to try out the issue. *Osborne v. Phoenix Insurance Co* 387

9. TRIAL—INSTRUCTIONS—AS A WHOLE—BREACH OF MARRIAGE PROMISE. In an action for breach of promise of marriage, instructions to the effect that, in case of postponements on account of plaintiff's health, the defendant was in duty bound to wait a reasonable length of time after the last postponement, are not erroneous in failing to state that the postponement must have been mutual, where in earlier instructions the court repeatedly told the jury that the postponements to be considered were those that were consented to by the defendant; since the instructions must be considered as a whole. *Travis v. Schnebly* 463

10. TRIAL—DELIBERATIONS—INSTRUCTIONS—REQUESTS. Upon a request for further instructions, the court may refer the jury to written instructions answering the questions fully, permitted to go to the jury room by agreement of counsel, in the absence of request by counsel for anything more specific. *Mott Iron Works v. Metropolitan Bank* 655

11. SAME—DELIBERATIONS OF JURY—INSTRUCTIONS. Admonitions to a jury to consult together and make an effort to agree, etc., are not prejudicial where there was nothing said calculated to coerce the judgment or lay the conscience of any reasonable juror. *Mott Iron Works v. Metropolitan Bank* 655

TROVER AND CONVERSION:

Conversion by mortgagee, see CHATTEL MORTGAGES, 3.

1. TROVER AND CONVERSION — CONSTRUCTIVE CONVERSION — PURPORTED SALE. A sale by defendant of all cedar poles "owned by us at Gray's Spur," when the defendant had no poles there, is a constructive conversion of plaintiff's poles there located and claimed by the vendee. *Bayley v. National Pole Co* 664

2. SAME—EVIDENCE—SUFFICIENCY—ADMISSIBILITY. Upon an issue as to whether defendant converted to its own use certain rejected culls

TROVER AND CONVERSION—CONTINUED.

from a lot of cedar poles purchased, by branding them, the fact that it attempted to sell them after removing all it had purchased, is sufficient to raise an inference that it did brand them; and evidence of a witness that some of them which he purchased were so branded is admissible. *Bayley v. National Pole Co*..... 664

3. TROVER AND CONVERSION—ACTIONS—INSTRUCTIONS—INTENT. Upon an issue as to the constructive conversion of cedar poles by a sale of the same as poles of the defendant, what the defendant "intended" is merged in the act, and properly omitted from instructions as to what constitutes a conversion. *Bayley v. National Pole Co*..... 664

TRUSTS:

1. TRUSTS—EXPRESS TRUSTS — PAROL EVIDENCE. Where a deed was given to the grantee as "trustee," intending to create an express trust as security for a debt to a stranger to the deed, it is not competent to prove the trust by parol. *Belcher v. Young*..... 303

2. TRUSTS—FAILURE OF PROOF—RESULTING TRUST. Where an express trust, without any new consideration between the parties, fails for want of proof, there is no resulting trust in favor of the grantee; but the trust, if any, is in favor of the grantor holding the equitable title, where the grantee waives all personal interest. *Belcher v. Young* 303

TUITION FEES:

See COLLEGES AND UNIVERSITIES; CONSTITUTIONAL LAW, 3.

UNIFORMITY:

Of taxes, see TAXATION, 8-10.

UNIVERSITY:

Tuition fees, see COLLEGES AND UNIVERSITIES; CONSTITUTIONAL LAW, 3.

USAGES:

See CUSTOMS AND USAGES.

VACATION:

See INJUNCTION, 4-6; JUDGMENT, 11-12.
Decree of divorce, see DIVORCE.

VENDOR AND PURCHASER:

See EXCHANGE OF PROPERTIES.
Evidence of title, see EVIDENCE, 5.
Actions for fraud, see FRAUD.
Purchasers of property fraudulently conveyed, see FRAUDULENT CONVEYANCES.

VENDOR AND PURCHASER—CONTINUED.

Conveyance of mortgaged property, see MORTGAGES, 4.
Transfer of ownership of personal property, see SALES.
Waiver of tender, see TENDER.

1. VENDOR AND PURCHASER — BONA FIDE PURCHASER — EQUITABLE TITLE. The doctrine protecting *bona fide* purchasers of land without notice applies solely to purchasers of the legal title, and the purchaser of an equitable interest, especially at judicial sale, acquires the property burdened with every prior equity charged upon it. *Thomas v. Scougale* 162

2. VENDOR AND PURCHASER—TIME—TENDER OF PERFORMANCE. Where a specific time is not fixed for the delivery of a deed, the vendor has a reasonable time after payment to make and tender it. *Banning v. Commercial Orchards Co* 554

3. SAME—RESCISSION BY VENDEE — DELAY — WAIVER. Rescission by vendee for delay, and stipulations making time of the essence, are waived where he accepted interest payments after time for performance, retained an outstanding deed, and made no demand for deed and abstract or offer to put the vendor *in statu quo*. *Banning v. Commercial Orchards Co* 554

4. SAME—RESCISSION—ACTIONS — DEFENSES. A vendee's action for rescission for delay in making the deed, although in form for sums paid and damages, is subject to equitable defenses. *Banning v. Commercial Orchards Co* 554

5. VENDOR AND PURCHASER—RESCISSION BY VENDEE—ESTOPPEL. Vendees, entitled to a deed containing personal covenants, are not estopped to rescind for failure of title by the fact that they orally agreed to take a deed from a third person who held the legal title, the vendors not being parties to such agreement and having no notice thereof, and the vendees deriving no benefit therefrom. *Macey v. Furman* 580

6. SAME—RESCISSION BY VENDEE—LACHES—ESTOPPEL. Vendees in a trade for land are not estopped by laches from rescinding for failure of title, where their delay was due to the vendor's request for time; since the vendors by delaying to answer are estopped to invoke delay as an estoppel against rescission. *Macey v. Furman* 580

7. SAME. Failure to abandon possession of land improved by mistake, does not estop the vendee from rescinding for failure of title. *Macey v. Furman* 580

8. SAME—MISTAKE—REMEDIES OF VENDEE—RESCISSION OR REFORMATION. Rescission, and not reformation of a deed to another tract originally given by mistake, is the vendee's proper remedy where the vendors had no title to the land pointed out and actually purchased. *Macey v. Furman* 580

VERDICT:

Review on appeal, see APPEAL AND ERROR, 31.
Excessiveness, see MALICIOUS PROSECUTION, 1.

VESTED RIGHTS:

Equal protection of laws, see CONSTITUTIONAL LAW, 4.

WAIVER:

See ESTOPPEL.
Error waived in appellate court, see APPEAL AND ERROR, 12.
Lien of mortgage, see CHATTEL MORTGAGES, 4.
Of defenses, see DIVORCE, 2.
Right to appointment as executor, see EXECUTORS AND ADMINISTRATORS.
Notice and proof of loss insured against, see INSURANCE, 2.
Of tender, see TENDER.
Of delay, see VENDOR AND PURCHASER, 3.

WAREHOUSEMEN:

1. WAREHOUSEMEN—RECEIPTS—"NEGOTIABLE" FORM. Warehousemen being permitted by 3 Rem. & Bal. Code, § 3369-1 to make receipts either negotiable or nonnegotiable, a receipt not in the form prescribed, but stamped "negotiable" and so issued, is properly deemed negotiable. *Klock Produce Co. v. Diamond Ice & Storage Co...* 67

2. SAME—LIEN FOR OTHER GOODS—NEGOTIABLE RECEIPTS—SURCHARGE. Under 3 Rem. & Bal. Code, § 3369-30, providing that, if a warehouseman issues a negotiable receipt, the goods shall not be subject to liens except for subsequent storage charges of those goods, unless the receipt expressly enumerates other charges for which a lien is claimed, such a receipt cannot subsequently be surcharged with liens for other goods not mentioned, upon making a partial withdrawal, by virtue of Id., § 3369-28, providing for such a lien for charges on other goods belonging to the same depositor "wherever deposited," since the later section is expressly made "subject to the provisions of § 3369-30." *Klock Produce Co. v. Diamond Ice & Storage Co....* 67

3. SAME—NEGOTIABLE RECEIPTS—LIEN ON OTHER GOODS—SURCHARGE ON PARTIAL WITHDRAWAL. On the partial withdrawal of goods from a warehouse, held on a negotiable receipt, which, under 3 Rem. & Bal. Code, § 3369-30, cannot be surcharged for other liens not expressly enumerated in the receipt, the warehouseman cannot, against the consent of the holder, alter the old receipt by indorsing thereon a claim of lien for storage of other goods not originally enumerated; and Id., § 3369-12, making a warehouseman liable to transferees of a negotiable receipt upon partial withdrawal of the goods, if they fail to take up or cancel the receipt or indorse a statement of the withdrawals, does not authorize the warehouse to force an exchange of receipts against the consent of the holder or surcharge a nego-

WAREHOUSEMEN—CONTINUED.

tiable receipt with other liens. *Klock Produce Co. v. Diamond Ice & Storage Co.* 67

4. SAME—NEGOTIABLE RECEIPTS—LIEN ON OTHER GOODS—SURCHARGING AS BETWEEN PARTIES. Rem. & Bal. Code, § 3369-30, providing that, where a warehouseman issues a negotiable receipt, the goods shall not be subject to liens except for subsequent storage charges of those goods, unless the receipt expressly enumerates other charges for which a lien is claimed, was not intended simply for the protection of transferees and third parties, but forbids belated surcharging of a negotiable receipt as between the original parties to the receipt; the policy of the law being to make negotiable receipts useful in the highest degree and the warehousemen being fully protected by liens on the stored goods. *Klock Produce Co. v. Diamond Ice & Storage Co.* 67

WARRANT OF ATTORNEY:

To confess judgment, see JUDGMENT, 13, 14.

WARRANTY:

On sale of goods, see SALES, 4, 5.

WATERS AND WATER COURSES:

See NAVIGABLE WATERS.

1. WATERS AND WATER COURSES—EASEMENTS — PRESCRIPTIVE RIGHT—ABANDONMENT—EVIDENCE—SUFFICIENCY. A prescriptive right for the flow of waste water from irrigated lands cannot be claimed, where, by a preponderance of the evidence, it appears that the waste ditch had been abandoned for eleven years by defendant's predecessors before he purchased, and as often as it was opened by defendant it was closed by the plaintiffs. *Philips v. Coumbe*..... 543

2. WATERS AND WATER COURSES—SURFACE WATERS—DIVERSION. An upper proprietor may by means of drainage ditches conduct and hasten the flow of surface waters naturally draining into a gully, in case it does not increase the quantity of water naturally reaching the lands of a lower proprietor. *Trigg v. Timmerman*..... 678

3. WATERS AND WATER COURSES—PRIVATE SUPPLY—DAMAGES—PUBLIC SERVICE COMMISSION—JURISDICTION. The public service commission does not have exclusive jurisdiction, and an action in damages will lie, in case of wrongful acts of a water company in making arbitrary and illegal demands and an unjust enforcement thereof, where the same had nothing to do with discrimination in rates. *Johnson v. Pacific Power & Light Co*..... 492

4. WATERS AND WATER COURSES — PUBLIC SUPPLY — ACQUISITION BY CITY—EXCESS SUPPLY. Where a city purchases an existing water

WATERS AND WATER COURSES—CONTINUED.

plant, taxpayers cannot complain that the city's present use is only forty per cent of the supply. *Spear v. Bremerton*..... 507

5. WATERS AND WATER COURSES — PUBLIC SUPPLY — ACQUISITION BY CITY—SALE OF SURPLUS—STATUTES. A city has power to acquire a water system and, after supplying its inhabitants, to dispose of surplus water to another municipality, under Rem. & Bal. Code, § 8005, authorizing such acquisition for the purpose of supplying its inhabitants "and any other persons," and 3 Id., § 8010-6, giving any city owning and operating its plant the right "to dispose of any surplus . . . remaining after the wants of the inhabitants thereof have been supplied." *Spear v. Bremerton*..... 507

6. SAME. The power of a city to dispose of its surplus water after supplying the wants of its inhabitants does not include the power to purchase and maintain a distributing system in another city or acquire the franchise of a water company therefor; since that is not directly or by implication authorized by statute, and the city cannot exercise the functions of such other city or deprive the latter thereof. *Spear v. Bremerton*..... 507

7. WATERS AND WATER COURSES—PUBLIC SUPPLY—POWER OF CITY—SURPLUS. A city has power to purchase a water system theretofore established and to dispose of any excess or surplus in the supply to any person within or without the city. *Spear v. Bremerton*... 507

8. WATERS AND WATER COURSES—WATERWORKS — CITY CONTRACT FOR SERVICE—CONSTRUCTION—REMEDIES OF COMPANY. In view of Rem. & Bal. Code, § 7687, requiring all demands against a city to be presented and audited and paid by warrants upon the treasurer, an agreement by a city to pay a water company an annual charge of $900, to be paid by means of rentals duly charged and collected against the property, contemplates payment of warrants from a fund agreed to be collected by the city, making them the equivalent of cash; and failure to make the collections would be a breach of the city's contract. *State ex rel. Wehe v. Pasco Reclamation Co*.... 606

9. SAME. Where a contract for water service required payment by the city of an annual charge, to be paid by means of rentals duly charged and collected against the property, and provided that, in case of default in payment or nonperformance by the city, the company might, at its option, shut off the water and discontinue service, the company's right to shut off the water is not affected by the fact that it has a remedy at law against the city by enforcement of the lien of the assessment against the property. *State ex rel. Wehe v. Pasco Reclamation Co.* 606

10. SAME. Neither is the right to shut off water affected by the fact that property owners paying the assessments would be injured thereby, as they may compel the city to proceed against defaulting owners. *State ex rel. Wehe v. Pasco Reclamation Co*..... 606

WAYS:

Public ways, see HIGHWAYS.

WILLS:

1. WILLS—JURISDICTION—VALIDITY — DETERMINATION DURING LIFE OF TESTATOR—ACTIONS. The courts have no jurisdiction to compel the surrender and cancellation of a purported will of an insane ward, at the suit of her guardian during her lifetime, or in the alternative, entertain the suit to perpetuate testimony as to her mental condition at the time the will was executed; since the courts have no jurisdiction over wills except as given by statute, and the guardian has no interest either in establishing or disestablishing a will of his ward. *Pond v. Faust*..... 117

WITNESSES:

Mileage and fees as costs, see COSTS, 1.
Evidence of deceased witness at former trial, see EVIDENCE, 6.

1. WITNESSES — PRIVILEGE — PHYSICIANS. Under Rem. & Bal. Code, § 1214, subd. 4, excluding the testimony of a physician, without the patient's consent, as to any information acquired in attending the patient which was necessary to enable him to prescribe, a physician cannot be asked as to the condition in which he found a patient for whom he intended to prescribe, whether he was up or how he was acting; it not being necessary for the patient to justify by showing that the same was the basis of the prescription; and it being immaterial that he had previously testified to taking from the physician medicine that put him to sleep. *Wesseler v. Great Northern R. Co.* 234

2. WITNESSES—CROSS-EXAMINATION—FRAUD. In an action for fraud, broad latitude is allowable in the cross-examination of the parties, and technical objections as to its extent having little bearing on the result are not ground for reversal. *Scribner v. Palmer*..... 595

WORK AND LABOR:

Liens for work and materials, see MECHANICS' LIENS.

1. WORK AND LABOR—IMPLIED CONTRACT—SUPPORT OF PARENT. A son cannot recover of his father for the board and keep of his mother, as upon an implied contract, where it appears that, to benefit her health, he took her from a sanitarium and brought her to his home on the coast without the knowledge of his father, no justification therefor and no breach of legal duty by the father being shown; since the presumption is that a parent is domiciled with a child by invitation, such suits are not favored, and the son was a volunteer and trespasser and cannot claim compensation for his wrong. *Olsen v. Olsen* 174

WRITS:

See INJUNCTION; MANDAMUS.